# RECORD, CASE No. 15,244.

## SUPREME COURT OF THE UNITED STATES.

### OCTOBER TERM, 1892.

TERM No., 1274.

THE UNITED STATES EX REL. THE INTERNATIONAL CONTRACTING COMPANY, PLAINTIFF IN ERROR,

*vs.*

STEPHEN B. ELKINS, SECRETARY OF THE DEPARTMENT OF WAR.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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a Supreme Court of the District of Columbia.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY
*vs.*
STEPHEN B. ELKINS, Secretary of the Department of War.
} At Law. No. 33596.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia.

THE UNITED STATES, *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY
*vs.*
STEPHEN B. ELKINS, Secretary of the Department of War.
} No. 33596. At Law.

*The Record.*

Petition. (Filed Dec., 1892.)

To the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia:

Your relator, The International Contracting Company, respectfully states:

I. It is a body corporate under the laws of the State of New Jersey. The respondent, Stephen B. Elkins, on and prior to the sixth day of August, 1892, was the Secretary of the Department of War of the United States of America, and has held that office continuously to the present time.

II. On and prior to the sixth day of August, 1892, Lieutenant Colonel George L. Gillespie was an officer in the corps of engineers of the Army of the United States, and was stationed at the city of New York, in the State of New York, in charge, under the chief of said corps of engineers and of said Secretary of the Department of War, of the work of dredging and otherwise improving New York harbor and adjacent waters, and said Gillespie has held said
2 office and has been stationed at the city of New York in charge of said improvements since that date.

III. Prior to the sixth day of August, 1892, it had been determined by the Government of the United States to dredge, or cause to be dredged, the channels in Gowanus bay, in the State of New York, and the Congress of the United States had theretofore appro-

priated a large sum of money for said work. On the sixth day of August, 1892, said Gillespie, by the authority of the chief of the corps of engineers and of said Secretary of the Department of War, prepared an advertisement inviting sealed proposals for dredging said channels in Gowanus bay, and immediately thereafter said advertisement was published in divers newspapers, in accordance with law. Said advertisement is in the words and figures following:

"U. S. engineer office, Army building, New York, Aug. 6, 1892. —Sealed proposals for dredging the channels in Gowanus bay, N. Y., will be received at this office until 12 m., Sept. 14, 1892, and then publicly opened. Specifications, blank forms, and all available information will be furnished on application to this office. G. L. Gillespie, lieut. col. of engineers."

IV. Said advertisement came to the notice of the relator and, on the fourteenth day of September, 1892, and prior to twelve o'clock meridian on that day, it delivered to said Gillespie, at his office in the city of New York, a sealed and properly endorsed proposal for doing the work called for by said advertisement, together with a guarantee signed by Alfred A. Howlett and Henry A. V. Post, and a justification of said guarantors. Said proposal was endorsed upon certain printed specifications relating to said proposed work. Said proposal, guarantee and justification of guarantors, were made upon blank forms which, after said advertisement was published as aforesaid, were furnished to the relator by said Gillespie, by the authority of said chief of the corps of engineers and of said Secretary of the Department of War, to be used by the relator in making a proposal in response to said advertisement, and said printed specifica-
3 tions were also furnished to the relator by said Gillespie, by the same authority, at the same time and for the same purpose.

A copy of said specifications, proposal, guarantee and justification of guarantors is hereby appended, marked "Exhibit A," and made part hereof.

V. Several other proposals for said work were received by said Gillespie, after said advertisement had been published as aforesaid and prior to twelve o'clock meridian, on September 14, 1892, and, at the hour of twelve o'clock noon, on September 14, 1892, said Gillespie publicly opened all said proposals, including the proposal received by him as aforesaid from the relator, and thereupon the fact was, and it was then and there found and determined by said Gillespie, that the relator was the lowest bidder for said work. Afterwards, and on or about the 16th day of September, 1892, said Gillespie transmitted all said proposals and accompanying papers to the chief of said corps of engineers at his office in the city of Washington, in the District of Columbia, and, in transmitting said proposals, said Gillespie in writing recommended that the contract for said work be awarded to the relator.

A copy of said communication of said Gillespie is hereto appended, marked "Exhibit B," and made part hereof.

Said communication from said Gillespie, and the said proposals, and accompanying papers were duly received at the said office of

said chief of engineers on or about the seventeenth day of September, 1892. Afterward, on or about the nineteenth day of September, 1892, and at said office of said chief of engineers in the city of Washington, said recommendation of said Gillespie was duly approved in writing by Major Henry M. Adams, an officer of said corps of engineers, who was then and there acting chief of engineers, and was in charge of said office, by virtue of a general order of the Secretary of the Department of War, made by authority of law and dated January 18, 1889, a copy of which is hereto appended, marked "Exhibit C," and made part hereof.

On or about the nineteenth day of September, 1892, said
4 Gillespie was instructed by said acting chief of engineers to notify the relator that its said bid had been accepted.

On the twenty-second day of September, 1892, said Gillespie, in pursuance of said instructions, sent a written communication to the relator, which it received on the following day, which said communication is in the words and figures following:

"Gowanus bay, N. Y.

"Subject: Acceptance of bid.

"Lt. Col. G. L. Gillespie, corps of engineers, U. S. A.

"Engineer office, U. S. Army, room F 7, Army building, 39 Whitehall street.

"NEW YORK, N. Y., *September* 22, 1892.

"Mr. Joseph Edwards, president the International Contracting Co., 16 Exchange place, N. Y. city.

"SIR: The proposal of the International Contracting Co., opened in this office Sept. 14, 1892, for dredging channels in Gowanus bay, N. Y., at 19.7 cents yer cubic yard, has been accepted by the chief of engineers, U. S. Army.

"After the contract for the work has been prepared, you will be notified to call at this office to sign it.

"The regulations require that any instrument executed by an incorporated company shall be under its corporate seal, and evidence should be furnished, also under the corporate seal, as to the official character of the person by whom it is executed, and that he is duly authorized to execute the same on behalf of the corporation.

"Please furnish this office with the names and addresses of your proposed sureties, each to justify in the sum of $45,000.

"A memorandum is inclosed containing instructions for the preparation of contractors' bonds. The execution of the necessary bond, however, will be deferred until the articles of agreement have been completed in every respect.

"Very respectfully, G. L. GILLESPIE,
*Lt. Col. of Engineers.*

"(1 inclo.)"

5 VI. Prior to the sixth day of August, 1892, there had been adopted and was in use by said corps of engineers, under the authority of the Secretary of the Department of War, a form of contract to be used by officers of said corps of engineers in the preparation of formal articles of agreement between the Government of the United States and persons who had contracted to do work on river and harbor improvements and other work under the supervision of said corps of engineers—said blank form of contract being the one referred to in paragraph No. 25 of the specifications forming part of "Exhibit A" hereto. Before the relator filed its said proposal, it had received from said Gillespie one of said printed forms of contract, and it filed its said proposal in reference thereto, and said Gillespie also referred thereto in his said letter of September 22, 1892. A copy of said form of contract is hereto appended, marked "Exhibit D," and made part hereof.

VII. On or about the twenty-sixth day of September, 1892, the relator notified said Gillespie that it was ready to give bond and enter into articles of agreement, in accordance with his said communication of September 22, 1892, and furnished him the names of its proposed sureties, each to justify in the sum of $45,000, and the relator ever since has been ready, able, and willing to enter into such articles of agreement with the Government of the United States, in accordance with the terms of its said proposal, and to give sureties as required by said specifications and, in all respects, to comply with its obligations arising out of its said proposal, and the acceptance thereof, as aforesaid, by the Government of the United States, and has, from time to time, demanded of said Secretary of the Department of War that the Government of the United States shall comply with its obligation in that behalf.

VIII. The chief of said corps of engineers at all times since said proposal was accepted as aforesaid, has recognized the relator's rights as hereinabove set forth, as appears by a communication from said chief of engineers to Hon. L. A. Grant, acting Secretary of War, dated October 4th, 1892, which is in the words and figures following:

6 "Subject: Dredging in Gowanus bay.

"Office of the chief of engineers, United States Army.

"WASHINGTON, D. C., *October* 4, 1892.

"Hon. L. A. Grant, acting Secretary of War.

"SIR: Referring to our conversation of this morning with reference to the cumulation of two or more works in one proposal and contract, I have the honor to invite your attention to the fact that prior to September 19, 1890, the Secretary of War under the operation of section 3717, Revised Statutes, was required to issue separate proposals and make separate contracts for separate works, but by section 2 of act of September 19, 1890, vol. 26, p. 452, Statutes, authority was given to cumulate two or more works of river and harbor improvement in the same proposal and contract. This is in

the interest of economy, and under this provision Lieutenant Colonel Gillespie issued requests for proposals for three works located in New York harbor. It was well understood that the bidders were bidding on all the work, and that a contract would be made for all the work or none, and in this competition the International Contracting Company was the lowest bidder. The local officer, Lieutenant Colonel Gillespie, recommended to the chief of engineers the acceptance of the bid of this company, which recommendation was approved on the 19th ultimo, and the International Contracting Company was, on the 22d of September, advised that their bid was accepted. After careful inquiry, it appears that the sureties of this company are entirely acceptable, and that when they made their bid they were an incorporated company, under the laws of the State of New Jersey.

"In view of all the facts, no other course than to perfect the contract with the International Contracting Company seems to me possible.

"Very respectfully, your obedient servant,

"THOS. LINCOLN CASEY,

"*Brig. Gen. Chief of Engineers.*"

7 But the said Secretary of the Department of War has refused to either execute, or cause to be executed, formal articles of agreement between the relator and said Government for the doing of said work in Gowanus bay and, on the contrary, has instructed the chief of said corps of engineers not to enter into any such articles of agreement, or to recognize in any way the rights of this relator under its said proposal and the acceptance thereof as aforesaid. And, against the wishes and protest of the relator, said Secretary of the Department of War has caused to be published a new advertisement for said work in Gowanus bay, and has caused to be prepared new specifications therefor, differing substantially from those used as aforesaid in regard to the letting of September 14, 1892, a copy of which said new specifications has been delivered to the relator by said Gillespie.

Said new advertisement is in the words and figures following:

"U. S. engineer office, Army building, New York, October 26, 1892.—Sealed proposals for dredging the channels in Gowanus bay, N. Y., will be received at this office until 12 m., December 21, 1892, and then publicly opened. Specifications, blank forms, and all available information will be furnished on application to this office. G. L. Gillespie, lieut. col. of engineers."

One of the copies of said new specifications, received from said Gillespie as aforesaid, is hereto appended, marked "Exhibit E," and made part hereof.

IX. On the sixth day of August, 1892, and thence continuously till the present time, there were in full force and effect certain regulations for the Army of the United States, which theretofore had been duly adopted and published by the Secretary of the Department of War by authority of law. A copy of such parts of said

regulations as the relator is advised are material in this connection is hereto appended, marked "Exhibit F," and made part hereof.

X. During the entire period referred to in the next preceding paragraph, there were also in full force and effect certain rules and regulations which theretofore had been approved and published by the Secretary of the Department of War, by authority of law, for the instruction and government of the corps of engineers of the Army of the United States. Such of said rules and regulations as the relator is advised are material in this behalf are in the words and figures following:

8

"2. The chief of engineers shall have his headquarters at the seat of government, and shall be charged under the direction of the Secretary of War, with the command of the engineer department, including its bureau, and with the regulation of the duties of the officers and troops of the corps of engineers, as well as of all agents and others who may be employed under his direction within the limits of his department. By virtue of this authority he directs the affairs of the department, and gives such orders to the officers and soldiers, and to all individuals connected therewith, as the necessities of the service demand.

* * * * * * *

"68. When bids are opened, and it is contemplated to enter into formal written contracts with bonds, the abstracts of the bids will be forwarded to the office of the chief of engineers, with recommendation for action in regard to accepting or rejecting the bid or bids received, and no such bid will be accepted or rejected by the officer in charge of work in advance of approval by the chief of engineers.

"69. When abstracts of bids are forwarded to the office of the chief of engineers, note will be made thereon of the balance of the appropriations for the work available for payments under the contract about to be entered into, and to obtain this balance all outstanding liabilities and amounts covered by existing contracts should be deducted from the unexpended appropriations for the work in so far as their expenditure has been authorized by approved projects. The abstracts will also show the totals of the respective bids.

"70. All contracts and papers connected with the same, made by officers of the corps or agents in charge of works, will be made in accordance with the printed forms prescribed by the Secretary of War; and these forms, and other printed forms allowed, will be furnished from the bureau when required.

9

"71. Extensions of contracts are not in any case to be made until the approval of the chief of engineers has been obtained."

XI. The relator is advised and avers that all the official acts and transactions set forth in paragraphs III to VII, both inclusive, of this petition were done and conducted in strict accordance with law and with the regulations prescribed as aforesaid for the government of the Army of the United States, and also with the rules and regulations prescribed as aforesaid for the instruction and government of said corps of engineers.

XII. The relator is advised and avers that by the acceptance of

its proposal, as aforesaid, there was imposed upon it the obligation of entering into articles of agreement with the Government of the United States, in accordance with the provisions of the specifications and blank form of articles of agreement, hereinabove referred to and made part hereof, and also the obligation of giving bond to the United States, with good and sufficient sureties for the faithful and proper fulfillment by it of such articles of agreement, and that thereupon and thereby it became and was the duty of said Stephen B. Elkins, Secretary of the Department of War, to cause to be executed, on behalf of the Government of the United States, and to be delivered to the relator articles of agreement upon the form of which "Exhibit D" hereto is a copy, in accordance with the specifications and the accepted proposal aforesaid, and to cause to be examined into and passed upon the sufficiency of the sureties tendered by the relator, as aforesaid.

Yet, notwithstanding the rights thus vested in the relator, it is unable, for the reasons hereinabove set forth, to enforce the same, and is without any remedy at law or in equity, save that which it hereby seeks to obtain.

Therefore the relator, The International Contracting Company, prays that the writ of mandamus may issue addressed to said Stephen B. Elkins, Secretary of the Department of War, commanding him to cause articles of agreement to be executed on behalf of the Government of the United States in the form of which "Exhibit D" hereto is a copy, and in accordance with the relator's said proposal and the said acceptance thereof, and to permit the relator also to execute such articles of agreement, and thereupon to deliver the same to the relator upon its entering into bond with good and sufficient sureties as required by its said guarantee; and also to withdraw and abandon said new advertisement.

THE INTERNATIONAL CONTRACTING COMPANY,
By JOSEPH EDWARDS, *President.*

DUDLEY & MICHENER,
A. S. WORTHINGTON,
*Attorneys for Relator.*

DISTRICT OF COLUMBIA, *ss:*

I, Joseph Edwards, on oath, say that I am the president of the International Contracting Company, whose name is signed to the foregoing petition by me; that I have been duly authorized to file said petition by the board of directors of said company, and that the statements made in said petition are true to the best of my knowledge and belief.

JOSEPH EDWARDS.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, at the city of Washington, in said District, this 5th day of December, A. D. 1892.

K. C. HORIGAN,
*Notary Public.*

[NOTARIAL SEAL.]

11 "EXHIBIT A."

Dredging the channel in Gowanus bay, New York.

*Advertisement.*

U. S. engineer office, Army building, 39 Whitehall street,

NEW YORK, N. Y., *August* 6, 1892.

Sealed proposals for dredging the channels in Gowanus bay, New York, will be received at this office until 12 m., September 14, 1892, and then publicly opened. Specifications, blank forms, and all available information will be furnished on application to this office.

*Specifications.*

General instructions for bidders.

1. The attention of bidders is especially invited to the acts of Congress approved February 26, 1885, and February 23, 1887, as printed in vol. 23, page 332, and vol. 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories or the District of Columbia.

2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. Maps of the localities may be seen at this office. Bidders, or their authorized agents, are expected to visit the place and to make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies.

4. No proposal will be considered unless accompanied by a guarantee in manner and form as directed in these instructions.

5. All bids and guarantees must be made in triplicate, upon printed forms to be obtained at this office.

6. The guaranty attached to each copy of the bid must be signed by two responsible guarantors, to be certified as good and sufficient guarantors by a judge of United States court, United States
12 district attorney, collector of customs, or any other officer under the United States Government.

7. A firm will not be accepted as surety, nor will a partner be accepted as surety for a copartner or for a firm of which he is a member. An officer of a corporation will not be accepted as surety for such corporation. Sureties must be citizens of the United States.

8. Each signature in proposals, guarantees, contracts, and bonds shall have affixed to them seals of wax, wafer, or other adhesive substance, and should be written out in full, and the signatures to the guarantees, contracts, and bonds should be attested by at least

one witness, and when practicable by a separate witness to each signature.

9. Each guarantor will justify in the sum of thirty thousand (30,000) dollars. The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Statutes, 487, chap. 120, and is expressed in the guarantee attached to the bid.

10. When firms bid, the individual names of members should be written out, and should be signed in full, giving the Christian names; but the signers may, if they choose, describe themselves in addition as doing business under a given name and style as a firm.

11. The place of residence of every bidder, and post-office address, with county and State, must be given after his signature.

12. All prices must be written as well as expressed in figures.

13. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person, must be securely attached to each copy of the proposal and be considered as comprising a part of it.

14. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

15. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid or to whom information in respect to proposals may have been given.

13 16. Any one signing the proposal as the agent of another or others must file with it legal evidence of his authority to do so.

17. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the proposals, or addition to the items mentioned therein. Any conditions, limitations, or provisos attached to proposals will be liable to render them informal, and cause their rejection.

18. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

19. If a bidder wishes to withdraw his proposal, he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and, when reached, it shall be handed to him or his authorized agent unread.

20. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

21. No bids received after the time set for opening of proposals will be considered.

22. The proposals and guarantees must be placed in a sealed envelope marked "Proposals for improving Gowanus bay, N. Y.," and inclosed in another sealed envelope addressed to "Lt. Col. G. L. Gillespie, corps of engineers, U. S. A.," at this office. The outer envelope must be so endorsed as to indicate before being opened the particular work for which the bid is made.

23. The United States reserves the right to reject any and all bids, and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor known as such to the engineer department.

24. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount equal to twenty-five per cent. of the money value of the contract, within (10) days after being notified of the acceptance of his proposal.

25. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the engineer department of the army, blank forms of which can be inspected at this office, and will be furnished if desired to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

26. The sureties are to make and subscribe affidavits of justification on the back of the bond to the contract and they must jointly justify in double the amount of the penalty.

27. Bidders are invited to be present at the opening of the bids.

General conditions.

28. A copy of this advertisement, specifications, and instructions will be attached to the contract and form a part of it.

29. The contractor should, within ten days from the award of the contract, furnish the office with the post-office address to which communications should be sent.

30. Transfers of contracts, or of interests in contracts, are prohibited by law.

31. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

32. The decision of the engineer officer in charge as to quality and quantity shall be final.

33. It is understood and agreed that the quantities given are approximate only, and it must be understood that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to examine the drawings, and are invited to make the estimates of quantities for themselves.

34. Payments will be made monthly. A percentage of ten (10) per centum will be retained from each payment until the completion of the contract.

35. Should the time for the completion of the contract be extended, all expenses for inspection and superintendence during the period of the extension, the same to be determined by the engineer officer in charge, shall be deducted from the payments due or to become due to the contractor; provided, however, that if the party of the first part shall, in the exercise of his discretion, because of freshets, ice, or other force or violence of the

elements, allow the contractor additional time in writing as provided for in the form of contract, there shall be no deduction for the expenses for inspection and superintendence for such additional time so allowed; provided further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided for in the form of contract adopted and in use by the engineer department of the army.

36. The attention of bidders is invited to the following provisions contained in act of Congress approved August 1, 1892.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.

SEC. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall upon conviction be punished by a fine not to exceed one thousand
16 dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

## Description of work.

Locality.—The locality of the proposed work is in Gowanus bay and creek, New York harbor, from the entrance to Erie basin to the foot of Percival street; and in Bay Ridge channel, from opposite Twenty-eighth street to opposite Sixtieth street. The mean range of the tide is 4.4 feet.

Dredging.—The channels will be dredged to a depth of 21 feet at mean low water, between lines to be laid out by the engineer in charge; the depth varies from 21 feet to 6 feet, and the cutting will average 10 feet.

Material.—So far as known the material consists of sand and mud.

Quantity.—The number of cubic yards to be removed will depend upon the contract price. The amounts available are:

| | |
|---|---|
| For Bay Ridge channel | $88,000 |
| For Red Hook channel (from entrance to Erie basin to Henry street) | 52,000 |
| For Gowanus Creek channel (from Henry street to Percival street) | 38,000 |

Dumping.—The dredged material will be disposed of by the contractor in accordance with the requirements of the supervisor of the harbor of New York.

Inspection.—The work will be done under the immediate supervision of inspectors, appointed by the engineer in charge, who will remain constantly with the plant while it is working, and to whom the contractor will afford reasonable and proper facilities for inspecting the channel and measuring the excavations. All buoys, stakes, gauges, etc., that may be required will be provided by the contractor.

Direction.—The work will be carried on under the direction of the engineer in charge. The orders of the local inspector referring to the manner of conducting the improvement will be strictly obeyed.

Material excavated beyond the lines designated, or from be-
17 low the contract depth in excess of an average of one foot over the area dredged will not be paid for. No work will be done on Sunday, nor on legal holidays, except by special authority from the engineer in charge.

Bids.—Bidders will state the price per cubic yard, scow measurement, at which they will agree to dredge and properly dump the material for each channel separately. Bidders must also state the number, character and capacity of the dredge they propose to use.

Progress.—If at the close of any working month the progress of the work shall not have been such as to indicate that the contract will be completed at the time specified, the engineer officer in charge of the work may take such measures as may seem necessary in his judgment to secure its completion by the designated time, and the excess of the cost, if any, of the work so done over that for equivalent amount of work done under the contract shall be deducted from the sum that may then be due the contractor, or that may subsequently become due him under the contract.

Time.—Work must be commenced on or before October 1, 1892, and completed on or before December 31, 1893. Contractors proposing to build special plant for this work, will so state in their bids, mentioning the date at which they will contract to begin work.

*Proposal for Improving Gowanus Bay, N. Y.*

NEW YORK CITY, N. Y., *Sept. 8th*, 1892.

To Lieut. Col. G. L. Gillespie, corps of engineers, U. S. A., Army building, 39 Whitehall St., N. Y. city.

SIR: In accordance with your advertisement of August 6, 1892, inviting proposals for improving Gowanus bay, N. Y., and subject to all the conditions and requirements thereof, and of your specifications, dated August 6, 1892, copies of both of which are hereto attached, and, so far as they relate to this proposal, are made a part

of it, we propose to do the dredging required, at the following prices, viz:

| 18 | $ Cts. |
|---|---|
| From Bay Ridge channel (from opposite 28th street to opposite 60th street) at the rate of nineteen $\frac{7}{10}$ cents per cubic yard, scow measurement | .19$\frac{7}{10}$ |
| From Red Hook channel (from entrance to Erie basin to Henry street), at the rate of nineteen $\frac{7}{10}$ cents per cubic yard, scow measurement | .19$\frac{7}{10}$ |
| From Gowanus Creek channel (from Henry street to Percival street), at the rate of nineteen $\frac{7}{10}$ cents per cubic yard, scow measurement | .19$\frac{7}{10}$ |

The plant proposed to be used is as follows:

Two combination dredges each of a capacity of four thousand (4,000) cubic yards per day with sufficient scows for the output: One of the said dredges with its scows to commence operations within 90 days of the awarding of the contract and the other dredge to commence operations 9 months thereafter, and the entire work to be completed on or before June 1st, 1894. In the event of an epidemic prevailing in this locality we reserve the privilege of ceasing the work until prudent to resume.

We make this proposal with a full knowledge of the kind, quantity, and quality of the articles required, and, if it is accepted, will, after receiving written notice of such acceptance, enter into contract within the time designated in the advertisement, with good and sufficient sureties for the faithful performance thereof.

(Signature.) THE INTERNATIONAL CONTRACTING COMPANY,
By JOSEPH EDWARDS, *President.* [SEAL.]

(Address.) 16 Exchange place, New York city, N. Y.

[SEAL OF CO.]

Attest: A. AMES HOWLETT,
*Vice-President.*

*Guarantee.*

We, Alfred A. Howlett of Syracuse, in the State of New York, and H. A. V. Post of New York, in the State of New York, hereby guarantee and bind ourselves and each of us, our and each of our heirs, executors, and administrators, to the effect that if the bid of the International Contracting Co., herewith accompanying, dated September 8th, 1892, for improving Gowanus bay, N. Y., shall be accepted in whole or in part within sixty (60) days from the date of the opening of proposals, the said bidder, the International Contracting Co., will, within ten days after being notified of such acceptance, enter into a contract with the United States in accordance with
19 the terms and conditions of the advertisement, and will give bond with good and sufficient sureties for the faithful and proper fulfillment of the same. And in case the said bidder shall

fail to enter into contract within the said ten days with the proper officer of the United States, and furnish good and sufficient bond for the faithful performance of the same according to the terms of said bid and advertisement, we and each of us hereby stipulate and guarantee, and bind ourselves and each of us, our and each of our heirs, executors and administrators, to pay unto the United States the difference in money between the amount of the bid of the said bidder and the amount for which the proper officer of the United States may contract with another party to improve said bay, if the latter amount be in excess of the former, for the whole period covered by the proposal.

ALFRED A. HOWLETT. [SEAL.]
H. A. V. POST. [SEAL.]

Witnesses:
ALBERT A. HALL.
A. AMES HOWLETT.

Dated, September 8th, 1892.

(Executed in triplicate.)

*Justification of the Guarantors.*

STATE OF NEW YORK, }
*County of New York,* } ss:

I, Alfred A. Howlett, one of the guarantors named in the within guarantee, do swear that I am pecuniarily worth the sum of thirty thousand (30,000) dollars, over and above all my debts and liabilities.

(Signature of guarantor.)

ALFRED A. HOWLETT. [SEAL.]

Sworn to before me, September 8th, 1892.

(Signature of officer administering oath, with seal, if any.)

[SEAL.] J. W. WEST,
*Notary Public, Richmond Co.,*
*Certificate Filed in New York Co.*

STATE OF NEW YORK, }
*County of New York,* } ss:

I, H. A. V. Post, one of the guarantors named in the within
20 guarantee, do swear that I am pecuniarily worth the sum of thirty thousand (30,000) dollars, over and above all my debts and liabilities.

(Signature of guarantor.)

H. A. V. POST. [SEAL.]

Sworn to before me, September 12th, 1892.

(Signature of officer administering oath, with seal, if any.)

[SEAL.] J. D. REYNOLDS,
*Notary Public, Kings Co., with*
*Certificate in New York Co.*

*Certificate.*

I, Francis Hendricks, collector of the port of New York, do hereby certify that Alfred A. Howlett and H. A. V. Post, the guarantors above named, are personally known to me, and that, to the best of my knowledge and belief, each is pecuniarily worth, over and above all his debts and liabilities, the sum stated in the accompanying affidavit subscribed by him.

F. H.

(Signature of certifying official.)

FRANCIS HENDRICKS,
*Collector.* [SEAL.]

NOTE.—The certificate may be given separately as to each guarantor and modified accordingly.

"EXHIBIT B."

(Copy.)

Engineer office, U. S. Army, room 62, Army building, 39 Whitehall St.

NEW YORK, N. Y., *September* 16, 1892.

Brig. Gen. Thomas L. Casey, chief of engineers, U. S. A., Washington, D. C.

GENERAL: I have the honor to enclose an abstract of proposals, and one copy of each proposal received and opened by me, September 14, 1892, for improving channels on Gowanus bay, N. Y.

The bid of the International Contracting Co., to do the work at 19.7 cents per cubic yard, is regarded as reasonable and just, and I respectfully recommend that it be accepted.

Very respectfully, your obedient servant,

(Signed) G. L. GILLESPIE,
*Lt. Col. of Engineers.*

(6 enclosures.)

21 (1st indorsement:)

OFFICE OF CHIEF OF ENGINEERS, U. S. ARMY, *Sept. 19th*, 1892.

Respectfully returned to Lt. Col. Gillespie, corps of engineers, approved. When such record as may be necessary has been made, this paper will be returned to this office.

(Signed) H. M. ADAMS,
*Major Corps of Engineers, in Charge.*

"EXHIBIT C."

WAR DEPARTMENT, WASHINGTON CITY, *January* 18, 1886.

*Orders:*

During the authorized absence of the chief of any bureaus of the War Department, the senior officer of the department or corps, whose chief is absent, on duty in said bureau, is, by direction of the President, under section 1132 of the Revised Statutes, empowered to take charge thereof and perform the duties of the chief of the department or corps, as the case may be, during such absence, but will not change or modify existing rules or regulations governing the business of said bureau, nor give orders or instructions tending to establish new rules, without first, in each case, obtaining the approval of the Secretary of War.

Each chief of a bureau will report to the Secretary of War, when he has authority to be absent, the name of the office who will take charge of his office under this order.

The order of July 31, 1885, upon this subject is hereby revoked.

WILLIAM. C. ENDICOTT,
*Secretary of War.*

Official copy:
JOHN TWEEDALE, *Chief Clerk.*

22 "EXHIBIT D."

(Form 19.)

Articles of agreement entered into this — day of ——, eighteen hundred and ninety- —, (189–,) between —— ——, corps of engineers, U. S. Army, of the first part, and —— —— and —— —— partners, doing business under the firm name of —— —— of —— of the county of ——, State of —— of the second part:

This agreement witnesseth that, in conformity with the advertisement and specifications hereunto attached, and which form a part of this contract, the said —— for and in behalf of the United States of America, and the said —— for ——, — heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

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---

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All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection, by an inspector appointed on the part of the Government, and such as — not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

The said — shall commence — on or before the — day of ——, eighteen hundred and ninety- —, (189–,) and shall complete the —

on or before the — day of ——, eighteen hundred and ninety-—, (189–.)

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanc-
23 tion of the chief of engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States: Provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement
24 was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included

therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the chief of engineers.

The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

Payments shall be made to the said —— —— when the —— contracted for shall have been delivered and accepted, reserving — per cent. from each payment until the whole — shall have been so delivered and accepted.

Neither this contract nor any interest therein shall be transferred by the said —— —— to any other party; and any such transfer shall cause the annulment of the contract so far as the United States are concerned. All rights of action, however, to recover for any breach of this contract by the said —— —— are reserved to the United States.

25 No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.*

This contract shall be subject to approval of the chief of engineers, U. S. A.

In witness whereof, the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

Witnesses:

—— ——.
—— ——.
—— ——.
—— ——.

(Executed in quintuplicate.)

Approved — ——, 189–.

—— ——,
*Brig. Gen., Chief of Engineers.*

*NOTE.—Here add to any contract made with an incorporated company for its general benefit the following words, viz: "But this stipulation, so far as it relates to members of or delegates to Congress, is not to be construed to extend to this contract."—See sec. 3740, Revised Statutes.

* I do solemnly swear that the foregoing is an exact copy of a contract made by me personally with —— ——; that I made the same fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said —— —— or any other person; and that the papers accompanying include all those relating to the said contract as required by the statute in such case made and provided.

—— ——,
—, *Corps of Engineers.*

Subscribed and sworn to before me this — day of ——, ——.

—— ——,
—— ——.

26 NOTE.—The copy of contract for the bureau must be accompanied with an abstract of the bids, and copy of each bid and advertisement, unless previously furnished.—See also A. R. 655.

NOTE.—See circular No. 18, O. C. of E., Oct. 18, 1887. See also circular No. 10, O. C. of E., Aug. 3, 1889.

## "EXHIBIT E."

(This exhibit is the same as the specifications forming a part of "Exhibit A" with the following exceptions:

1. The date August 6 is erased and October 27 inserted.
2. The date of opening proposals is changed from September 14 to December 21.
3. The whole of paragraph 36 is erased.
4. The paragraph "time.—Work must be commenced on or before October 1, 1892, and completed on or before December 31, 1893. Contractors proposing to build special plant for this work will so state in their bids, mentioning the date at which they will contract to begin work."

Is changed so as to read as follows:

"Time.—Work must be commenced on or before April 5th, 1892, and completed on or before August 1st, 1894."

5. The following paragraph is added to the specifications:

"Bidders may make proposals for one or more of the channels, naming a separate price per cubic yard for each with a view of obtaining a contract for the channel so bid upon independently of the award of contracts for other channels. Or they may independently, or in addition, name separate prices for two or more channels with the view of obtaining contracts for all of the channels for which proposals are so made by them.")

* NOTE.—This affidavit is required only on the quintuplicate copy of contract intended for the Returns Office, Department of the Interior.—A. R. 669.

"EXHIBIT F."

WAR DEPARTMENT, *February* 9, 1889.

The President of the United States directs that the following regulations for the army be published for the government of all concerned, and that they be strictly observed. Nothing con-
27 trary to the tenor of these regulations will be enjoined in any part of the forces of the United States by any commander whatsoever.

WM. C. ENDICOTT,
*Secretary of War.*

ARTICLE IV.

*Command.*

* * * * * * *

13. The functions assigned to any officer in these regulations by title of office, devolve upon the officer acting in his place, except when otherwise specified.

* * * * * * *

ARTICLE LXII.

*Staff Administration.*

813. The supply, payment, and recruitment of the army, and the direction of the expenditures of the appropriation for its support, are by law, intrusted to the Secretary of War. He exercises control through the bureaus of the War Department. He determines where and how particular supplies shall be purchased, where they shall be delivered, inspected and stored, and how distributed. (R. S., sections 219, 220, 221, 222, 223, 1133, 1141, 1152, 1164, 1173, 1175, 1186, 1188.)

* * * * * * *

ARTICLE LXXXII.

*Corps of Engineers.*

(NOTE.—Regulations for the government of the corps of engineers, prepared and published under the authority of the Secretary of War, are distributed to its officers by the chief of engineers. Only such regulations are herein given as are general in their nature or affect other branches of the service.)

1683. The duties of the corps of engineers comprise reconnoitering and surveying for military purposes; the selection of sites and formation of plans and estimates for military defenses; the construction and repair of fortifications and their accessories of every description; the planning and superintending of defensive or
28 offensive works of troops in the field; the examination of routes of communication for supplies and for military move-

ments, and the construction of military roads and bridges; also the execution of river and harbor improvements assigned to it, and such other duties as the President may order. It collects, arranges, and preserves all correspondence, reports, memoirs, estimates, plans, drawings, deeds, titles, and models which concern or relate in anywise to the several duties above enumerated.

1864. The chief of engineers shall have his headquarters at the seat of government, and shall be charged under the direction of the Secretary of War, with the command of the engineer department, including its bureau, and with the regulation of the duties of the officers and troops of the corps of engineers, as well as of all agents and others who may be employed under his direction within the limits of his department. By virtue of this authority, he directs the affairs of his department, and gives such orders to the officers and soldiers, and to all individuals connected therewith, as the necessities of the service demand.

* * * * * *

## ARTICLE LVII.

*Contracts and Purchases.*

* * * * * *

*Proposals.*

622. Information in regard to supplies or services, for which proposals have been invited, will be furnished, on application, to all persons desiring it.

* * * * * * *

624. Bidders for labor will be informed of the nature and extent of the services required, where they are to be performed, and the time allowed for performance. They will be furnished with, or allowed to examine, plans and specifications of all works upon which they desire to bid, and, in general, will be furnished with any information needed to enable them to act understandingly.

* * * * * *

29 638. Except in rare cases, when the United States may elect to exercise its right to reject proposals, contracts will be awarded to the lowest responsible *bona fide* bidder, who, when required, produces a proper article, and whose proposal therefor is not unreasonable. In considering bids on similar lists of articles, the advertisements and circulars should, in the absence of a fixed standard for all the articles bid for, be so worded as to permit the award for the most suitable articles offered for the purpose required, and the bids must be considered item by item.

639. Slight failures on the part of a bidder to comply strictly with the terms of an advertisement should not necessarily lead to the rejection of his bid; but the interest of the Government should be fully considered in making the award.

* * * * * * *

*Contracts.*

Execution and performance.

651. Formal written contracts under seal, with suitable bonds, will be made in all cases, when time and circumstances permit, except that under the conditions named in paragraph 670 officers whose duty it is to contract for the Government may exercise the discretion therein granted as the interests of the service may dictate.

652. Contracts will be made as nearly as practicable according to prescribed forms, departing therefrom only so far as requisite to meet the necessities of the public service. All conditions will be stated therein as fully and clearly as possible. Contracts shall be made in the name of, and shall be signed by, the chief officer of that branch of the staff of the command to which they pertain.

653. Upon receipt of the contract at the proper bureau of the War Department, it will be examined to see that it complies with the laws, regulations and orders. If found correct, the approval of the proper officer will be endorsed thereon. Should any illegality be discovered it will be submitted to the Secretary of War for his action.

* * * * * * *

30 In the Supreme Court of the District of Columbia.

AT CHAMBERS, *December* 6, 1892.

THE U. S. *ex Rel.* THE INTERNATIONAL CONTRACTING COMPANY
*vs.*
STEPHEN B. ELKINS, Secretary of the Department of War. } At Law. No. 33596.

This application for rule to show cause is hereby certified to the general term, to be heard in the first instance.

Dec. 6, '92.

E. F. BINGHAM,
*Chief Justice.*

*Order Fixing Time for Hearing.*

In the Supreme Court of the District of Columbia, in General Term, December 6th, 1892.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY
*vs.*
STEPHEN B. ELKINS, Secretary of the Department of War. } At Law. No. 33596.

Ordered that this application shall be heard on Friday, December 9, 1892, at the opening of this court, provided a copy of this

order and of the petition in this case and of the exhibits thereto be served on the respondent at or before three o'clock p. m. on Wednesday, December 7, 1892.

By the court:

[SEAL.] E. F. BINGHAM,
*Chief Justice.*

31 *Marshal's Return.*

Served copy of the within order and also copy of the petition filed in this cause on Stephen B. Elkins, Secretary of War, Dec. 6, 1892.

D. M. RANSDELL, *Marshal.*

*Rule to Show Cause.*

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY
*vs.*
STEPHEN B. ELKINS, Secretary of the Department of War.
} No. 33596. At Law.

Upon motion of the attorneys for the relator, counsel for respondent being present and not objecting hereto, it is this ninth day of December, 1892, ordered that the respondent show cause, at the opening of the court on the thirteenth day of December, why the writ of mandamus should not issue as prayed for in the petition in this cause.

E. F. BINGHAM,
*Chief Justice.*

32 *Return of Respondent. Filed December* 15, 1892.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Rel.* THE INTERNATIONAL CONTRACTING COMPANY,
*vs.*
STEPHEN B. ELKINS, Secretary of the Department of War.
} No. 33596. At Law.

The return of the respondent, Stephen B. Elkins, Secretary of War, to the rule made by this honorable court to show cause why the writ of mandamus should not issue upon the petition of the above-named relator, respectfully shows as follows:

1. The respondent has no knowledge whether or not the relator is an incorporated company; subject to this reservation, he admits that the averments in paragraph numbered I of said petition are true.

2. He admits that the averments in paragraph II are true.

3. He admits that the averments set forth in paragraph III are true.

33 4. He admits that the proposal referred to in the fourth paragraph of the petition was made upon a blank form furnished to the relator by said Gillispie, in accordance with the practice of the War Department, but this respondent asserts that the proposal made by the relator and indorsed upon said blank was not responsive to or in accordance with the requirements of the specifications set forth on said blanks. The respondent alleges that the conditions set forth in said proposal were and are inconsistent with the specifications referred to in the advertisement set forth in paragraph III of the petition and furnished to all bidders who competed for the construction of the work intended.

And this the respondent will hereafter more fully show in connection with excerpts from said specifications.

5. The respondent admits that divers other proposals for said work were received by said Gillispie, and that the same were publicly opened at 12 o'clock noon on September 14, 1892, and that said Gillispie then stated that the relator was the lowest bidder for said work. Said Gillispie made an abstract of the proposals opened, and transmitted the same to the War Department. A copy of said abstract is hereto appended, marked Exhibit 1, and made a part hereof. And respondent admits that the acting chief of engineers approved the recommendation of said Gillispie, who, by his direction, September 22, 1892, transmitted to the relator the letter set forth in petitioner's paragraph V. But respondent denies that the recommendation of said Gillispie, or the approval thereof by the acting chief of engineers, or the communication sent by said

34 Gillispie to the relator, were or are, under existing circumstances, official notices or of legal or binding effect.

6. In answer to paragraph VI, the respondent denies that the form of contract constituting relator's Exhibit D was used between the Government and "persons who had contracted to do work on river and harbor improvements or other work under the supervision of said corps of engineers," but he admits that said form was and is used in the concluding of contracts between the United States and contractors, and that such form is referred to in the specifications.

7. Respondent, further answering, says that at the time referred to in relator's paragraph numbered VII he believes relater desired to obtain a contract for the work in question, and stood ready to enter into articles of agreement "in accordance with the terms of its said proposal, and to give sureties as required by said specifications, and in all respects to comply with its obligations arising out of said proposal," but respondent denies that relator offered to contract in accordance with the advertisement and specifications made and existing in the case, and denies that the relator demanded of the Secretary a compliance with the obligations of the Government in that behalf.

8. In response to relator's paragraph numbered VIII, respondent

admits that the letter therein set forth was written by the chief of engineers and was transmitted to the acting Secretary of War, but whether the said chief of engineers has at all times since the acts denominated "proposal" and "acceptance" recognized the "relator's rights," as in said petition set forth, is, as respondent is advised and therefore avers, not now material.

35 Further answering the averments in said paragraph, the respondent says that following said September 22, and soon after the letter bearing date on that day and set forth on (printed) page 4 of relator's petition was written, further proceedings were had and taken in the War Department, and by officers thereof, and by the relator, which are shown by and appear from the following several communications consecutively marked *aa* to *ss* inclusive, viz:

*aa.*

(Telegram.)

WASHINGTON, D. C., *Sept.* 24, 1892.

To Col. G. L. Gillespie, engineers, Army building, Whitehall St., New York, N. Y.:

Do not proceed further with closing a contract with the International Dredging Company for Gowanus work until further instructions. Acknowledge receipt of this.

TURTLE, *Engineers.*

*bb.*

NEW YORK, *Sept.* 24, 1892.

Chief of engineers, Wash'n, D. C.:

Have received telegraphic instructions regarding contract with International Contracting Company for work in Gowanus bay.

GILLESPIE, *Engineer.*

36 *cc.*

(Copy of document. 4226. War Dept., 6, 1892. Telegram.)

NEW YORK, *Sept.* 26, 1892.

Brig. Gen. Thomas L. Casey, chief of engineers, U. S. Army, Army bldg., Washington, D. C.:

We protest against the giving to any party any part of the work of the dredging in the Gowanus bay, New York harbor, bids for which were opened on the fourteenth inst. We are the lowest bidders and were notified on the twenty-second instant that our bid had been accepted by you and the contract was being prepared for us to sign and have therefore made all preparations to execute this work according to our proposal. We request that you give this company an opportunity to be heard any time after the coming Thursday, as we have been and are still busy in examining into the Hudson River improvement with a view of bidding on same. This

is the reason of our not coming on to see you immediately. Have written you.

JOSEPH EDWARDS,
*Pres't The International Contracting Co.*

*dd.*

(First indorsement.)

OFFICE CHIEF OF ENGINEERS, U. S. ARMY, *Sept.* 27, 1892.

Respectfully submitted to the Secretary of War, recommending consideration of the request.

THOS. LINCOLN CASEY,
*Brig. Gen., Chief of Engineers.*

37 *ee.*

(2nd indorsement.)

WAR DEPARTMENT, *September* 27, 1892.

Respectfully returned to the chief of engineers, who will please call the attention of the Secretary to the protests in connection with the papers in the case.

By order of the acting Secretary of War.

SAM'L HODGKINS,
*Acting Chief Clerk.*

*ff.*

(3rd indorsement.)

OFFICE CHIEF OF ENGINEERS, U. S. ARMY, *Oct.* 1, 1892.

Respectfully returned to the Secretary of War.

In accordance with the indorsement of the acting Secretary of War, dated Sept. 23, 1892, upon the protest of the W. H. Beard Dredging Co., dated Sept. 21, 1892, the entering into contract for work at Gowanus Bay channels and Bay Ridge channel, Gowanus bay, New York, was suspended to await further directions from the Secretary of War. There are, herewith, the above protest of the Beard Dredging Co. and all the other papers forming the case 4226, War Dep't, 1892, so far received at this office.

There are also herewith a telegram and a letter, both dated Sept. 29, 1892, from Mr. A. P. Ketchum, of New York. Mr. Ketchum alleged that he was attorney for the Beard Dredging Co., but Mr. Beard declared that he knew nothing of him.

38 There are also herewith the bids opened Sept. 14, 1892, for the work in question, together with an abstract of the same, all inclosures to the letter of Lieut. Col. Gillespie, also herewith, to which, and to the indorsements thereon attention is invited.

THOS. LINCOLN CASEY,
*Brig. Gen., Chief of Engineers.*

*gg.*

OCTOBER 7, 1892.

GENTLEMEN: The matter of the contract for dredging in Gowanus bay is not yet settled, and the action of the Department upon the bids received has not yet been determined upon. It is respectfully suggested that if you desire to be heard upon the subject an opportunity is offered. Any representation you desire to make, either by writing or orally, by attorney or by any officer of your company, will be respectfully received and considered. It is hoped that you will be able to do this by Tuesday—certainly not later than Wednesday—of next week.

Very respectfully,

L. A. GRANT,
*Acting Secretary of War.*

The International Dredging Company, Post bldg., 12 to 28 Exchange place, New York city.

39 *hh.*

(4th indorsement.)

War Department, judge advocate general's office.

WASHINGTON, D. C., *Oct.* 10, 1892.

Respectfully returned to the Secretary of War.

Section 3744 of the Revised Statutes of the United States (act of June 2, 1862), makes it the duty of the Secretary of War, the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof.

It was held by the Supreme Court in Clark *vs.* United States (95 U. S., 439), that this statute operates as a statute of frauds and makes it unlawful for the contracting officers to make contracts in any other way—in other words, that, to bind the United States, such contracts must be in writing and signed by the contracting parties. In the case of the South Boston Iron Company *vs.* United States (118 U. S., 37), the statement of facts shows that the bidders offered to the Secretary of the Navy by letter to construct new boilers for certain vessels of the navy, that the offer was accepted by the Navy Department, by letter, and that a few days later they were notified to discontinue all work contracted for. With reference to this condition of facts the Supreme Court says: "An effort has been made in this case to show a contract in writing, but we agree entirely with the Court of Claims that the papers relied on for that purpose are
nothing more in law or in fact than the preliminary memo-
40 randa made by the parties for use in preparing a contract for execution in the form required by law. This was never done, and, therefore, the United States never became bound."

Applying the principle of these decisions to the matter of the ac-

ceptance of the bid of the International Contracting Company it can, purely as a legal proposition arising under section 3744 of the Revised Statutes, safely be said that the War Department has not, by accepting the bid, entered into a contract, and is not bound by such acceptance to enter into a contract.

G. NORMAN LIEBER,
*Acting Judge Advocate General.*

*ii.*

(5th indorsement.)

WAR DEPARTMENT, *October* 13, 1892.

The award in this case was contested. The W. H. Beard Dredging Company claimed that the contract should be awarded to them on the ground that they were the lowest bidders; that the bid of the International Contracting Company was irregular and ought not to be considered, inasmuch as it was not made according to the terms of the proposal as to the time of completing the work; time being an essential and important part of the whole transaction. They also claimed that even if the bid of the International Contracting Company was considered, the W. H. Beard Dredging Company should be awarded the contract for the work at two of the points named in the proposal, as they were the lowest bidders for the work at those two points.

41 On the other hand, it was claimed by the International Contracting Company that they were the lowest bidders and were entitled to the contract for the whole work; that the bid of the W. H. Beard Dredging Company was irregular and ought not to be considered, inasmuch as it was in the alternative and dependent upon the construction of the 8-hour law. They also claimed that their bid had been accepted and the award made to them, and that the Government is bound to give them the contract. Both of the parties above named appeared by officers of the respective companies and by counsel, and presented their statements and argued their respective cases before the acting Secretary of War, October 11, 1892.

After a full hearing and consideration of all the papers in the case and the statements of the respective parties, and the argument of counsel, and after reference to the acting judge advocate general, it is considered and decided that—

(1) The so-called acceptance of the bid of the International Contracting Company was not properly made, and that it is not binding upon the Government.

(2) That the bids of both the International Contracting Company and the W. H. Beard Dredging Company were irregular and improper, and that neither of said bids should be accepted.

(3) That all bids should be rejected and the work should be readvertised.

The papers are respectfully referred to the chief of engineers for action in accordance with the above-stated decision, and in accordance with the following suggestions:

(1) The proposal and advertisement should be so made that the Government can award the contract for the work at each of the three points separately or together as shall appear for the
42 best interest of the Government. This seems to be required by the plain dictates of common sense, and by the legislation of Congress.

(2) The proposal and advertisement should not include the quotation from the 8-hour law, which was inserted in the former proposal. Upon this subject reference is made to the telegram from the private secretary of the Secretary of War, dated October 11, herewith, that the 8-hour law should not be inserted.

In this connection it is respectfully suggested that it might be well to revoke or modify the order of the chief of engineers requiring quotation from that law to be inserted. The insertion increases the expenses of printing, makes the papers more cumbersome, and tends to confuse and raise questions. The purpose of the order was commendable. It brought home to bidders and contractors a knowledge of the law and deprived them of excuses for its non-observance. But the order has probably fully accomplished its purpose. The law has been advertised, and no one can now consistently plead ignorance of its provisions.

L. A. GRANT,
*Acting Secretary of War.*

*kk.*

(6th indorsement.)

OFFICE CHIEF OF ENGINEERS, U. S. ARMY, *Oct.* 14, 1892.

Respectfully referred to Lieut. Colonel Gillespie, corps of engineers, for his information and guidance, his attention being invited to the preceding indorsement. These papers to be returned.

By command of Brig. Gen. Casey.

43 *ll.*

(Gowanus bay dredging.)

WAR DEPARTMENT, WASHINGTON, *October* 15, 1892.

SIR: At the special request of the attorney for the International Contracting Company, you will please suspend further action in the case of the Gowanus bay dredging for five days. At the end of the five days, unless otherwise directed, you will please to proceed the same as if this note had not been written.

Very respectfully,

L. A. GRANT,
*Acting Secretary of War.*

General Thos. Lincoln Casey, chief of engineers, U. S. A.

*mm.*

NEW YORK, N. Y., *October* 17, 1892.

Brig. Gen. Thomas L. Casey, chief of engineers, U. S. A., Washington, D. C.

GENERAL: I have the honor to acknowledge the receipt of the following telegram:

"WASHINGTON, D. C., *Oct.* 15, 1892.

"To Col. G. L. Gillespie, No. 49 E. 53d St., N. Y. city:

"Suspend all action under the recent orders of Secretary of War concerning contracts for Gowanus channels until further orders.

"CASEY,
"*Chief of Engineers.*"

Very respectfully, your obedient servant,
G. L. GILLESPIE,
*Lt. Col. of Engineer.*

44 *nn.*

WAR DEPARTMENT, WASHINGTON, *October* 20, 1892.

SIR: You will please extend the delay of action in the Gowanus bay dredging matter until Wednesday morning next, October 26.

Very respectfully, L. A. GRANT,
*Acting Secretary of War.*

Gen. Thos. Lincoln Casey, chief of engineers.

*oo.*

Engineer office, U. S. Army, room F 7, Army building, 39 Whitehall street,

NEW YORK, N. Y., *October* 26, 1892.

Brig. Gen. Thomas L. Casey, chief of engineers, U. S. A., Washington, D. C.

GENERAL: I have the honor to acknowledge the receipt of the following telegram:

"WASHINGTON, D. C., *Oct.* 26, 1892.

"To Lieut. Colonel Gillespie, engineers, Army bldg., N. Y. city:

"Referring to my telegram of fifteenth directing suspension of action concerning contracts for Gowanus channels you will now proceed to readvertise the work as directed in War Department indorsement of thirteenth.

"CASEY,
"*Chief of Engineers.*"

Very respectfully, your obedient servant,
G. L. GILLESPIE,
*Lt. Col. of Engineers.*

45 *pp.*

4.10] WAR DEPARTMENT,
OFFICE OF THE JUDGE ADVOCATE GENERAL,
WASHINGTON, *November 18th*, 1892.

To the Secretary of War.

SIR: Referring to the matter of the bids for the dredging of Gowanus bay, and respectfully inviting attention to my endorsement of October 10th, 1892, I have the honor to submit the following:

Under section 3744, Revised Statutes, as construed by the United States Supreme Court in Clark *vs.* United States (95 United States Reports, 539), and the South Boston Iron Company *vs.* United States (118 United States Reports, 37), there has as yet been no contract made in this case.

Were it not for section 3744 the acceptance of a bid would, under the general law of contracts, bind the United States. But the Supreme Court has decided that that section is a statute of frauds, and that under it a contract must be in writing and signed at the end; nothing preliminary to this being binding on the United States.

This section relates to contracts entered into by the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior.

But a contract may still be entered into with any bidder for this work whose bid substantially complies with the specifications. I find that there is a difficulty which—not having had occasion to consider the matter from this point of view—I did not at first fully appreciate. The International Contracting Company has made a bid based upon a period of time for the completion of the work differing from that of the specifications by five months. It seems to be a material variance. So that, if a contract were let on
46 the basis of this bid, it would, as to a material matter and therefore as to the contract, be one in effect made without advertising.

A contract made without advertising has, under section 3709, Revised Statutes, been held to be void (Schneider *vs.* United States, 19 Court of Claims, 547), or not binding (15 Attorney Generals' Opinions, 538). Except in the case of emergency it would at least be unauthorized by law and not binding on the United States, and an executive officer would not be justified in disregarding the law.

Upon the whole, I am of opinion that proposals should be advertised for anew.

Very respectfully, your obedient servant,

G. NORMAN LIEBER,
*Acting Judge Advocate General.*

*qq.*

(7th indorsement.)

WAR DEPARTMENT, *November* 21, 1892.

Respectfully returned to the chief of engineers. The Secretary of

War directs that all the bids be rejected and the work be readvertised for as ordered in the 5th indorsement thereon.

By order of the Secretary of War:

J. B. RANDOLPH,
*Acting Chief Clerk.*

47 *rr.*

(8th indorsement.)

OFFICE CHIEF OF ENGINEERS, U. S. ARMY,
*Nov.* 21, 1892.

Respectfully returned to the Secretary of War. The instructions contained in the 5th indorsement in regard to readvertisement have already been carried out by Lieut. Colonel Gillespie, corps of engineers, the officer in charge, so far as submitting form of advertisement to be published, which was forwarded to the chief clerk of the War Department from this office on Oct. 28, 1892, and the authority to publish the same has not yet been received, but is awaiting the action of the chief clerk.

THOS. LINCOLN CASEY,
*Brig. Gen., Chief of Engineers.*

*ss.*

NEW YORK, *Nov.* 29, 1892—10.55 a. m.

Secretary of War, Wash'n, D. C.:

New advertisement for Gowanus bay improvement was sent to papers Friday last, and bids will be opened in answer thereto December twenty-first.

GILLESPIE, *Engineer.*

And respondent further answering says, that the telegram marked "*cc*," and bearing date September 26, in which the relator asks for a hearing in relation to the matters now set forth in its peti-
48 tion, was duly received, and the eight documents consecutively marked "1st indorsement," to "8th indorsement," respectively, represent and set forth action had and taken pursuant to and in immediate connection with relator's said telegram of date of September 26.

And the other proceedings referred to in the foregoing documents were taken, as set forth, on the part of the War Department and the officers thereof, and were duly taken as in said documents indicated, and the conclusion arrived at, rejecting relator's bid, was reached by an exercise of the discretionary power and the judgment of the Secretary of War.

And this respondent admits that he declined to execute or to cause to be executed the formal articles of agreement which relator desired to have executed, and admits that he did not concede to relator those things which it claimed as its rights under the so-called proposal and acceptance; and admits that a new advertisement for

said work in Gowanus bay has been published in the form stated, and that the specifications under the new advertisment are as in Relator's Exhibit E.

And respondent further says that the authority of the United States to reject all bids appears in paragraph 23 of the specifications originally delivered to relator, and that the proceedings which led up to the rejection of the several bids set forth in Exhibit 1 relate back to erroneous and unauthorized clauses inserted in relator's "proposal," and appear in the documents in this paragraph set forth.

49 9. In response to the paragraph numbered IX the respondent admits that the army regulations set forth in Exhibit F are correct, and that they have the force appertaining to regulations.

10. Further answering, respondent makes a like admission as to paragraph numbered X, and as to the regulations therein set forth.

11. In answer to paragraph numbered XI, respondent says that he is advised that the proposal filed by relator, and referred to in several of the paragraphs included within the scope of said paragraph XI, was not in accordance with law or with any regulation, and therefore respondent avers that the letter which is called an acceptance was not, under that proposal, authorized by law or by regulation, and also that all acts referred to in the semblance of an official approval of said proposal were and are without the authority of law or of regulation.

And for further answer to said paragraph XI, this respondent begs to refer to, and to reassert, so far as may be applicable, the several answers hereinbefore made by respondent to the respective paragraphs included within the terms of said paragraph XI.

12. In answer to paragraph XII respondent says that he is advised that he is not required to now pass upon, or decide as to relator's duties as detailed in said paragraph; but this respondent is advised and avers that it did not at any time become his duty to cause to be executed, on behalf of the Government of the United States, and to be delivered to relator, articles of agreement as set forth in said paragraph.

50 And further answering said paragraph, respondent, as advised, denying the implied averment that relator has vested rights in the premises, begs to submit to this honorable court, whether the relator, as it avers, is without any remedy at law or in equity, save that which it seeks to obtain by virtue of said petition.

13. This respondent, further answering relator's petition, says that the caption of the specifications received by the relator which appeared upon the papers on which its bid was made, is as follows: (See Relator's Exhibit A.)

"*Dredging the Channels in Gowanus Bay, New York.*

(Advertisement.)

U. S. engineer office, Army building, 39 Whitehall street.

NEW YORK, N. Y., *August* 6, 1892.

Sealed proposals for dredging the channels in Gowanus bay, New York, will be received at this office until 12 m., September 14, 1892, and then publicly opened. Specifications, blank forms, and all available information will be furnished on application to this office.

*Specifications.*

General instructions for bidders."

Specifications Nos. 17 and 23 are respectively as follows:

17. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the pro-
51 posals, or addition to the items mentioned therein. Any conditions, limitations, or provisos attached to proposals will be liable to render them informal, and cause their rejection.

23. The United States reserves the right to reject any and all bids, and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor known as such to the engineer department.

Under the heading "Description of the work," the concluding paragraph is as follows:

Time.—Work must be commenced on or before October 1, 1892, and completed on or before December 31, 1893. Contractors proposing to build special plant for this work will so state in their bids, mentioning the date at which they will contract to begin work.

On page 4 is this heading: "Proposal for improving Gowanus bay, N. Y."

Instead of properly filling the blank in the middle of page 4, intended for the description of the plant to be used, the relator, erroneously and without authority, wrote therein, and caused the same to read, as follows:

"The plant proposed to be used is as follows:"

Two combination dredges, each of a capacity of four thousand (4,000) cubic yards per day, with sufficient scows for the output, one of said dredges, with its scows, to commence operations within 90 days of the awarding of the contract, and the other dredge to commence operations 9 months thereafter, and the entire work to be completed on or before June 1st, 1894. In the event of an epidemic prevailing in this locality we reserve the privilege of ceasing work
until prudent to resume.

52 And relator's bid, when received, was found to contain these clauses.

And respondent is advised and believes, and respectfully submits to this court, that the condition delaying and postponing the commencement of the work and the condition postponing the time of the completion of the work from December 31, 1892, to June 1, 1894, and the condition reserving an alternative in the event of the prevalence of an epidemic, were, and each condition was and is, contrary to the language and to the intent of the specifications.

Respondent further says that neither of said conditions appear in the proposals of any other bidder, and in these respects relator's bid differed from all other bids received.

In relator's case, as respondent is advised and believes, its bid was not responsive to the advertisement, nor in accord with the specifications, nor upon the same conditions that other competitors made their estimates and bids; and if the objectionable clauses were incorporated into a contract, the original specifications would be substantially changed by force of these clauses.

14. Further showing cause why the writ of mandamus ought not to issue to the respondent "commanding him to cause articles of agreement to be executed on behalf of the Government of the United States, * * * and also to withdraw and abandon said new advertisement," as prayed for by relator in its petition—respondent says, that the questions involved in this controversy and the documents relating thereto were referred to the law officer of the War Department, to wit, the acting judge advocate gen-
53 eral, who examined the case and rendered and delivered an opinion thereon bearing date October 10, 1892, which opinion is set forth in the preceding paragraph marked 8 in document marked "*hh*;" and said officer, upon further examination, rendered and delivered a further opinion thereon, bearing date November 18, which opinion is set forth in said paragraph 8, in document marked "*pp*," which opinions in substance and effect inform and advise respondent that the execution of the contract sought to be procured by relator will be contrary to the requirements of the law.

15. Respondent, showing cause as stated in the last preceding paragraph, further answering, says, that the subject-matter of the duty and action of the Secretary of the Department of War upon the questions now sought to be brought before this court by relator's petition was heretofore duly submitted to and passed upon by the Attorney General of the United States, acting in accordance with the practice of the departments and the statutes in such case made and provided, and by his official opinion bearing date December 2, 1892, and duly rendered and delivered before the commencement of these proceedings, respondent is informed and advised that "no legal or binding contract was entered into between the International Contracting Company and the United States;" and also that "the clauses of the proposal made by said company which substituted new, different, and important conditions as to delaying and postponing the work, are inconsistent with the specifications, and in contravention of the purpose, spirit, and intent of

the statutes authorizing the letting of contracts upon adver-
54 tisement." A copy of said opinion is hereto appended and marked Exhibit 2, and made a part hereof. Respondent is advised and avers that he is in duty bound to regard and follow the opinion; and that it appears from the opinion referred to that the completion by respondent of the contract referred to in relator's petition is not an act merely ministerial in its nature, or one that the relator has a right to demand.

16. Respondent further avers, that in accordance with the discretion and judgment of the officer acting, and upon a proper and due exercise of such discretion and such judgment, the questions now presented by the relator in its petition were before the initiation of these proceedings, duly decided and determined, all of which is shown in and by the fifth and seventh indorsements connected with relator's telegram of September 26 (marked "*cc*"), which two indorsements appear in paragraph 8 of this return dated respectively October 13 and November 21, 1892, and marked respectively "*ii*" and "*qq*."

17. This respondent therefore prays that the writ asked for by the relator be refused and that the petition be dismissed.

STEPHEN B. ELKINS,
*Secretary of War.*

A. X. PARKER,
*Assistant Att'y Gen.*
C. C. COLE,
*U. S. District Attorney,*
*Of Counsel for Respondent.*

55 DISTRICT OF COLUMBIA, *ss:*

I, Stephen B. Elkins, Secretary of War of the United States, on oath, say that the statements made in the foregoing answer are true to the best of my knowledge and belief.

S. B. ELKINS.

Subscribed and sworn before me, a notary public in and for the District of Columbia, at the city of Washington, in said District, this 13th day of December, 1892.

JNO. B. RANDOLPH,
[L. S.] *Notary Public.*

56 EXHIBIT 1.

U. S. ENGINEER OFFICE,
ARMY BUILDING, NEW YORK, *August* 6, 1892.

Sealed proposals for dredging the channels in Gowanus bay, N. Y., will be received at this office until 12 m. September 14, 1892, and then publicly opened. Specifications, blank forms, and all available information will be furnished on application to this office.

G. L. GILLESPIE,
*Lieut. Col. of Engineers.*

*Abstract of Proposals for Improving Channels in Gowanus Bay, New York, Received in Response to the Attached Advertisement, Dated August 6, 1892, and Opened September 14, 1892, by Lieut. Col. G. L. Gillespie, Corps of Engineers.*

| No. of proposal. | Names of bidders. | Dredging 440,000 cubic yards from Bay Ridge channel. | | Dredging 280,000 cubic yards from Red Hook channel. | | Dredging 190,000 cubic yards from Gowanus Creek channel. | | Total. | Remarks. |
|---|---|---|---|---|---|---|---|---|---|
| | | Price per cubic yard. | Amount. | Price per cubic yard. | Amount. | Price per cubic yard. | Amount. | | |
| 1 | The International Contracting Co. | $0.19 7/10 | $86,680 | $0.19 7/10 | $55,160 | $0.19 7/10 | $37,430 | $179,270 | Lowest bid. |
| 2 | Atlantic Dredging Co. | .35 | 154,000 | .30 | 84,000 | .42 | 79,800 | 317,800 | |
| 3 | The W. H. Beard Dredging Co. | .23 64/100 | 104,016 | .21 9/10 | 61,320 | .27 6/10 | 52,440 | 217,776 | If restricted to 8 hours' work per day. |
| 3 | The W. H. Beard Dredging Co. | .19 7/10 | 86,630 | .18 25/100 | 51,100 | .23 | 43,700 | 181,480 | If unrestricted in regard to working hours per day. |
| 4 | P. Sanford Ross | .28 | 123,200 | .24½ | 68,600 | .32 4/10 | 61,560 | 253,360 | |
| 5 | Morris & Cumings Dredging Co. | .27⅛ | 119,350 | .24½ | 68,600 | .33 | 62,700 | 250,650 | |

I certify that the above abstract is correct. Bid No. 1 is regarded as reasonable and just, and its acceptance is recommended.

G. L. GILLESPIE,
*Lieut. Col. of Engineers.*

1892.
NOTE.—Sept. 14. Balance unexpended from appropriation of act Sept. 19, 1890 ..... $774 96
Amount appropriated by act of July 13, 1892 ..... 198,600 00
Sept. 14. Total available ..... 199,374 96

58 EXHIBIT 2.

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *December* 2, 1892.

The Secretary of War.

SIR: Your communication relating to the advertisement and proposals and to action taken in connection therewith in the matter of the Gowanus Bay improvement, in the harbor of New York, under the river and harbor act of July 13, 1892, has received due attention.

By said river and harbor act (Stats., 90), $100,000 is appropriated for "improving Gowanus Bay channels," "for distribution * * * between the Red Hook and Gowanus Creek channels," and also $98,000 for completing improvement of Bay Ridge channel, in said bay.

In August, 1892, advertisement was made on behalf of the Government calling for "proposals for dredging the channels in Gowanus bay," the same to be opened at the United States engineer's office on the 14th of September.

The proposals were required to comply with specifications which were furnished by the Government and were returned with the bids filed.

By specification 23, "The United States reserves the right to reject any and all bids, and to waive any informality in the bids received."

The concluding specification is as follows:

"Time.—Work must be commenced on or before October 1, 1892, and completed on or before December 31, 1893. Contractors proposing to build special plant for this work will so state in their bids, mentioning the date at which they will contract to begin work.")

59 In response to the advertisement, proposals or bids were received from divers bidders setting forth prices at which each would perform the dredging required, respectively, upon the three several improvements.

On September 14 the bids were opened, considered, and recorded.

One of these proposals was submitted by the International Contracting Company. Its bid is, in effect, that it will dredge the channels for 19.7 cents per cubic yard.

In this bid, under the printed heading of the form, "The plant proposed to be used is as follows:" these clauses are written, viz:

"Two combination dredges, each of a capacity of four thousand (4,000) cubic yards per day, with sufficient scows for the output. One of the said dredges, with its scows, to commence operations within 90 days of the awarding of the contract, and the other dredge to commence operations 9 months thereafter, and the entire work to be completed on or before June 1st, 1894. In the event of an epidemic prevailing in this locality, we reserve the privilege of ceasing the work until prudent to resume."

The officer of the engineers in charge at New York came to the

conclusion that the bid made by the company was the lowest proposal received and that it was reasonable in its terms.

This local officer recommended the acceptance of this bid to the chief of engineers, which recommendation was approved by that officer September 19, and in pursuance thereof said company was, September 22, informed that its bid was accepted.

On September 23 the chief of engineers was advised by the acting Secretary of War to confer with the Secretary before awarding the contract to said company.

60 On September 26 the company protested against the giving of any part of the dredging in Gowanus bay to others, and insisted that the contract should be given to it, and requested an opportunity to be heard.

The company was afterward heard at length. After the hearing the acting Secretary of War decided that the acceptance referred to did not constitute a contract with and was not binding upon the United States.

The statutory requirements as to advertising for proposals and as to the making of contracts are as follows:

By section 3709, Revised Statutes, it is provided, subject to exceptions not now of consequence, that—

"All purchases and contracts for supplies or services in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same."

Following and continuing substantially the requirements of a provision of the river and harbor act of 1878 (20 Stat., 160) the corresponding act of 1888 (25 Stat., 423) declares—

"That it shall be the duty of the Secretary of War to apply the money herein and hereafter appropriated for improvements of rivers and harbors, other than surveys, estimates and gaugings, in carrying on the various works, by contract or otherwise, as may be most economical and advantageous to the Government. Where said works are done by contract, such contract shall be made after sufficient public advertisement for proposals, in such manner and form as the Secretary of War shall prescribe."

61 By section 3744, Revised Statutes, it is enacted that—

"It shall be the duty of the Secretary of War * * * to cause and require every contract made * * * on behalf of the Government, or by * * * officers under (him) appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof;" * * *

In the case before us it is manifest that time is an important element of the proposed contract.

The company named recognizes this in its requirement of five months beyond the limit named by the Government.

It may well be that if competing bidders had been offered the additional time their prices would have been less.

If one making proposals is allowed to add five months to the specified time, it is difficult to state where the limit to similar liberties shall be placed.

If one bidder may add one-third to the time specified, may not another add one-half, and so forth?

The fairness of contracts upon advertisement, specifications, and competition, requires that all bidders shall, as to all matters of consequence, those which affect the cost of the work and the amount of expenditure required to be used in performing it, be subject substantially to the same terms and conditions.

My attention has been called to army regulation No. 639, which says that "slight failures on the part of a bidder to comply strictly with the terms of an advertisement should not necessarily lead to the rejection of his bid," etc.

The taking by a bidder without the knowledge of his competitors of one-third additional time in which to perform an important and expensive improvement, which from its nature must require a long period, is not in any sense the slight failure to comply strictly intended by this regulation.

62

The change made in this case is not a mere informality; it is a radical departure from the proposed terms of the contemplated contract.

Section 3744, Revised Statutes, which comes from the act of June 2, 1862 (12 Stat., 411), was considered and construed by the Supreme Court in Clark *v.* United States (95 U. S., 539).

The court held that the statute was intended to operate to prevent reckless engagements and frauds, and that "it makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties," and adds: "This is equivalent to prohibiting any other mode of making contracts." It is also stated that a party who makes a contract without having it reduced to writing aids in the violation of the law.

It is held that the contract is affected and must conform to the requirements of the statute.

In the case of the South Boston Iron Company (118 U. S., 37), which strongly resembles the one now under consideration, the court again considered the statute in question and explicitly approved the doctrine that was laid down in Clark's case.

Under these cases it cannot be said that the International Contracting Company has entered into a contract under section 3744.

It is my opinion that, under the facts stated and the statutes and decisions referred to, no legal or binding contract was entered into between the International Contracting Company and the United States.

It is my opinion, also, that the clauses of the proposal made by said company which substituted new, different, and important conditions as to delaying or postponing the work are inconsistent with the specifications, and in contravention of the purpose, spirit, and intent of the statutes authorizing the letting of contracts upon advertisement.

63

Very respectfully,

W. H. H. MILLER,
*Attorney General.*

64 WEDNESDAY, *December* 21, 1892.

Session resumed pursuant to adjournment.
Chief Justice Bingham and Justices Hagner and Cox.

THE INTERNATIONAL CONTRACTING COMPANY
*vs.*
Secretary of War, STEPHEN B. ELKINS, and Chief of the Corps of Engineers, THOS. LINCOLN CASEY.
33596. Law. Mandamus.

The petitioner's application for mandamus herein having been by Mr. Chief Justice Bingham referred here to be heard in general term in the first instance and having been argued by counsel and submitted to the court, it is thereupon by the court considered that said application be, and it is hereby, dismissed at the petitioner's costs, to be taxed by the clerk, and that the defendant have execution thereof, from which decision and judgment the petitioner in open court prays the allowance of writ of error to Supreme Court of the United States, and the same is allowed, and the bond to prosecute same is hereby fixed, with penalty of two hundred dollars.

65 *Order for Issuance of Writ of Error. Filed December* 21, 1892.

In the Supreme Court of the District of Columbia, the 21 Day of December, 1892.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING CO.
*vs.*
STEPHEN B. ELKINS, Sec'y of the Dep't of War.
At Law. No. 33596.

The clerk of said court will issue a writ of error in this case.

A. S. WORTHINGTON,
*Attorney for Relator.*

*Withdrawal by Plaintiff of Writ of Error & Motion for Reargument. Filed December* 29, 1892.

In the Supreme Court of the District of Columbia, in General Term.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY
*vs.*
STEPHEN B. ELKINS, Secretary of the Department of War.
No. 33596. At Law.

The relator hereby withdraws and abandons the writ of error sued out by it in this case and moves the court for a reargument of the cause.

A. S. WORTHINGTON,
*Attorney for Plaintiff.*

66 *Order Continuing Till Next Term Plaintiff's Motion for Reargument. Filed December* 29, 1892.

In the Supreme Court of the District of Columbia, in General Term.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY
*vs.*
STEPHEN B. ELKINS, Secretary of the Department of War.
No. 33596. At Law.

Upon consideration of the motion of the relator in this case for a reargument of the case it is this twenty-ninth day of December, 1892, ordered that said motion be, and is hereby, continued to the next term of this court.

E. F. BINGHAM, *C. J.*

*Order Overruling Motion for Reargument, &c. Filed January* 9, 1893.

In the Supreme Court of the District of Columbia, in General Term.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING CO.
*vs.*
STEPHEN B. ELKINS, Secretary of the Department of War.
No. 33596. At Law.

Upon consideration of the motion for a reargument filed herein by the relator on the 29th day of December, the same being submitted this day to the court without argument, it is this 9th
67 day of January, 1893, ordered that said motion be, and it is hereby, overruled, and, the relator now again in open court praying the allowance of a writ of error from the Supreme Court of the United States in this case, the same is allowed and the penalty of the bond to be given to prosecute the same is fixed at the sum of two hundred dollars.

E. F. BINGHAM, *C. J.*

*Order for Writ of Error. Filed January* 9, 1893.

In the Supreme Court of the District of Columbia, the 9th Day of January, 1893.

THE UNITED STATES *ex Relatione* THE INTERNATIONAL CONTRACTING COMPANY
*vs.*
STEPHEN B. ELKINS, Secretary of the Department of War.
At Law.
Precipe. No. 33596.

The clerk of said court will issue a writ of error in this case from the Supreme Court of the United States to the supreme court of the District of Columbia.

A S. WORTHINGTON,
*Attorney for Relator.*

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you or some of you, between The United States *ex relatione* the International Contracting Company and Stephen B. Elkins, Secretary of the Department of War, being No. 33596, at law, a manifest error hath happened, to the great damage of the said International Contracting Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 9th day of January, in the year of our Lord one thousand eight hundred and ninety-three.

JOHN R. YOUNG,
*Clerk of the Supreme Court of the District of Columbia.*

Allowed by

———.

69 UNITED STATES OF AMERICA, *ss:*

To Stephen B. Elkins, Secretary of the Department of War, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The United States *ex relatione* the International Contracting Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 9th day of January,

in the year of our Lord one thousand eight hundred and ninety-three.

E. F. BINGHAM,
*Chief Justice.*

Service of this citation accepted this 10th day of January, 1893.
C. C. COLE,
*Att'y for Def't in Error.*

70 Know all men by these presents that we, The International Contracting Company, a body corporate under the laws of the State of New Jersey, as principal, and Charles E. Kimball, of Summit, N. J., and Charles O. Thompson, of New York, N. Y., as sureties, are held and firmly bound unto Stephen B. Elkins, Secretary of the Department of War, in the full and just sum of two hundred dollars, to be paid to the said Stephen B. Elkins, Secretary of the Department of War, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of January, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a term of the supreme court of the District of Columbia holding a general term, in a suit depending in said court between The United States *ex relatione* the International Contracting Company and Stephen B. Elkins, Secretary of the Department of War, a judgment was rendered against the said The United States *ex relatione* the International Contracting Company, and the said The International Contracting Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Stephen B. Elkins, Secretary of the Department of War, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington within — days from the date thereof:

Now, the condition of the above obligation is such that if the said The International Contracting Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE INTERNATIONAL CONTRACTING COMPANY,
By JOSEPH EDWARDS, *Pres't.* [SEAL.]
CHARLES O. THOMPSON. [SEAL.]
CHAS. E. KIMBALL. [SEAL.]

Sealed and delivered in presence of (as to all parties)—
HARLAN M. HOYT.

Approved by—
E. F. BINGHAM, *C. J.*

Filed Jan'y 12, 1893.

71 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 70, inclusive, to be a full, true, and correct transcript of the record of all the proceedings had in said court in cause No. 33596, at law, wherein The United States *ex rel.* the International Contracting Company is plaintiff and Stephen B. Elkins, Secretary of the Department of War, is respondent, as the same remains upon the files and records of said supreme court of the District of Columbia.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 12th day of January, A. D. 1893.

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: Case No. 15,244. District of Columbia supreme court. Term No., 1274. The United States *ex rel.* the International Contracting Company, plaintiff in error, *vs.* Stephen B. Elkins, Secretary of the Department of War. Filed January 12, 1893.

IN THE

# Supreme Court of the District of Columbia.

IN GENERAL TERM.

THE UNITED STATES, *ex relatione*
The International Contracting Company
*vs.*
STEPHEN B. ELKINS,
Secretary of the Department of War.

No. 33,596.
At Law.

## BRIEF FOR THE RELATOR.

### *Statement of the Case.*

By the River and Harbor bill approved July 13, 1892, (27 Stat., 90) Congress made an appropriation for the improvement of Gowanus Bay channels in New York. The act, following the usual language of such bills, provides that the money shall be expended "under the direction of the Secretary of War and the supervision of the Chief of Engineers."

In August last Lieut. Col. G. L. Gillespie, the proper local engineer officer at New York, advertised for proposals for dredging the channels in question, giving notice that sealed proposals would be received at his office in New York until noon, September 14, when they would be publicly opened. The advertisement further stated that specifications, blank forms of proposals, and all available information would be furnished on application (Record, 2).

The relator obtained from the office in question the specifications referred to in the advertisement, including a blank form of contract made part of the specifications, and such other information as it desired. Upon the back

of the specifications was a blank form of proposal to be used by bidders, and there was appended to the specifications a form of guarantee to be signed by two sureties. This guarantee provided that if the contract should be awarded to the bidder filing it, he would enter into a contract with the United States in accordance with the terms and conditions of the advertisement, and would give bond with good and sufficient sureties for the faithful and proper fulfillment of the contract. One of these specifications, with the proposal filled up by the relator and the guarantee attached, was filed with Lieut. Col. Gillespie by the relator in due season, and a copy thereof is "Exhibit A" to the petition in this case (Record, 11–20).

One of the provisions of the specifications is:

"25. The contract which the bidder and guarantors promise to enter into shall be in its general provisions in the form adopted and in use by the engineer department of the army, blank forms of which can be inspected at this office and will be furnished if desired to parties proposing to put in bids. Parties making bids should be understood as accepting the terms and conditions contained in such form of contract." (13, 14.)

The relator before making its bid obtained a copy of the form of contract here referred to and made its bid in reference thereto (5). A copy of this blank is made "Exhibit D" to the petition in this case (22-25).

Several other proposals were filed, and at the time and place fixed by the advertisement Lieut. Col. Gillespie opened all the proposals. The relator was the lowest bidder and he so found, and as required by law, and the regulations thereunder, he forwarded all the proposals and accompanying papers to the Chief of Engineers at Washington, recommending that the contract be awarded to the relator as the lowest bidder (3). That officer ap-

proved his recommendation and returned the paper to him for proper action (3).

Accordingly, on the 22d of September, Lieut. Col. Gillespie, on behalf of the Government, formally accepted the relator's proposal and instructed the relator to furnish him with the names and addresses of its proposed sureties, each to justify in the sum of $45,000, adding, however, that the execution of the bond would be deferred until the completion of the "articles of agreement" (4).

The relator promptly furnished the names of its sureties (5) and they were satisfactory to the Chief of Engineers (6). But the Secretary of War instructed the Chief of Engineers not to enter into the proposed articles of agreement nor to recognize the rights of the relator under its proposal and the acceptance thereof, and against the demand of the relator that a contract with it be executed, (5) and against its wishes and protest (7), the respondent has caused the work to be readvertised, and a new letting is to be had on the 21st of December, unless in the meantime the relator shall obtain the relief which it now seeks.

The object of this proceeding is to have the Secretary of War directed to cause articles of agreement on behalf of the Government to be executed, in the form of which "Exhibit D" is a copy, filled up in accordance with relator's said proposal and the acceptance thereof, and to permit the relator to execute the articles and (upon its giving sureties as required by law) to deliver them to the relator—also that the respondent may be required to withdraw the advertisement for a reletting of the work.

## ARGUMENT.

### I.

*The unconditional acceptance by the Chief of Engineers of the relator's proposal completed a contract from which neither of the parties thereto was thereafter at liberty to withdraw without the consent of the other.*

Many decisions are to be found in the reports, English and American, upon the question whether when the minds of the parties have met upon all the terms of a contract they are yet not bound for the reason that it appears that it is their intention that their agreement shall thereafter be reduced to a formal written contract to be by them signed.

It is well settled that they are bound unless it appears that a condition of the agreement is that it shall not take effect until the formal writing has been prepared and signed.

Chinnock *vs.* Marchioness of Ely, 4 DeG. J. & S., 638.
Bonnewell *vs.* Jenkins, L. R. 8, Ch. Div., 70.
Rossiter *vs.* Miller, 39 L. T. Rep., N. S., 173.
Cheney *vs.* Eastern Transp. Line, 59 Md., 557.
3 Eng. & Am. Enc. of Law, 854, etc., and notes.

But we need not examine minutely the cases on this general proposition for the reason that there is no question that where competitive bids or proposals are invited and the proposal of one of the bidders is accepted, the contract is complete although, as is nearly always the case, both parties expressly contemplate executing thereafter a formal instrument evidencing the contract.

Adams *vs.* U. S., 1 Court of Claims, 192.
Moore *vs.* U. S., 1 Ct. Cl., 90.
Schneider *vs.* U. S., 19 Ct. Cl., 547.

McCollum's Case, 17 Ct. Cl., 92.
4 Opin. Atty.-Genl., 334.
6 Opin. Atty.-Genl., 226.
Garfielde *vs.* U. S., 93 U. S., 242.

Such cases are analogous to those in which parties agree to a sale of land to be carried into effect thereafter by a formal conveyance. Of course, after the agreement is completed neither party can withdraw, although the deed—the principal object of the negotiation—has not been executed. This principle applies in dealings with the Government.

Ryan *vs.* U. S., 136 U. S., 85.

In the present case there is no room for doubt that it was well understood by both parties that the acceptance of the relator's proposal completed a contract between them.

By an act of Congress approved April 10, 1878 (20th St., 36) as amended by an act approved March 23, 1888 (22 St., 487) it is provided:

"The Secretary of War is hereby authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department and he may require every bid to be accompanied by a written guarantee, signed by one or more responsible persons, to the effect that he or they undertake that the bidder, *if his bid is accepted*, will, at such time as may be prescribed by the Secretary of War or the officer authorized to make a contract in the premises, give bond, with good and sufficient sureties, to furnish the supplies proposed and to perform the service required. *If after the acceptance of a bid and a notification thereof to the bidder* he fails within the time prescribed by the Secretary of War or other duly authorized officer, to enter into a contract and furnish a bond with good and sufficient security for the proper fulfillment of its terms, the Secretary of War, or other authorized officer, shall

proceed to contract with some other person to furnish the supplies or perform the service required, and shall forthwith cause the difference between the amount specified by *the bidder in default* in the proposal and the amount for which he may have contracted with another party to furnish the supplies or perform the service for the whole period of the proposal to be charged up against the bidder and his guarantor or guarantors, and the sum may be immediately recovered by the United States for the use of the War Department in an action of debt against either or all of such persons."

The specifications in this case expressly refer to this act (12). They also inform the bidder that he may withdraw his proposal at any time before the hour fixed for opening the proposals (13), and by necessary implication that he can not do so after the bids are opened.

The bidder is further told by the specifications that he will be required to enter into a written contract with the United States with good and approved security in an amount equal to 25 per cent. of the money value of the the contract within ten days after being notified of the acceptance of his proposal (13). Stringent provisions are prescribed to establish the sufficiency of the sureties (Specifications, paragraph 26, Record 14). The bidder is required to agree, when he files his proposal, that after receiving written notice of its acceptance he will enter into contract within the time designated (18), and when he files his proposal he is required to file with it a bond, with sureties, that within ten days after being notified of the acceptance of his proposal he will enter into the contract. Such a bond was actually given in this case, and the sureties justified in the sum of $30,000 before the Collector of the port of New York (19, 20). This bond, following the above-quoted act of Congress, gives to the Government, in case the bidder shall refuse to enter into

the formal contract, the right to re-let the work at his expense.

In the face of all this it is idle to say that if the acceptance in this case was authorized, the contract was not complete when the relator received notice that its proposal was accepted.

II.

*The Acceptance was Authorized.*

The Secretary of War "exercises control through the bureaus of the War Department." (Par. 1813, Army Regulations, Record, page 27).

The duties of the corps of engineers comprise the execution of river and harbor improvements, and the Chief of Engineers is charged under the direction of the Secretary of War with the command of the engineer department, including its bureau, by virtue of which authority "he directs the officers of his department and gives such orders to the officers * * * as the necessities of the service demand." (Pars. 1683, 1684, Army Regulations, Record 27, 28.)

Contracts are to be made in the name of and signed by the chief officer of that branch of the staff of the command of the War Department to which they pertain. His approval is all that is necessary. (Pars. 652, 653, Army Regulations, Record 29.) The Supreme Court has frequently decided that powers imposed by law upon the President may be exercised by the heads of departments in their own names, and that the heads of departments may carry on the work of their several offices through the instrumentality of subordinate officers acting in their own names. Nine-tenths of the business of the Government is transacted in this way.

Williams *vs.* U. S., 1 How., 290.
Parker *vs.* U. S., 1 Pet., 293.
Miller *vs.* Mayor of N. Y., 109 U. S., 394.

The form of contract (Exhibit D) used in this case shows that it is to be approved, not by the Secretary of War, but by the Chief of Engineers. And this form was prescribed by the Secretary of War himself (5), in pursuance of the Act of Congress approved August 11, 1888, (25 Stat., 423).

It is clear that the acceptance of the relator's bid has the same effect as though it had been signed by the Secretary of War himself.

## III.

*The acceptance of the relator's proposal completed a valid contract between the parties, notwithstanding the provisions of Section 3744 of the Revised Statutes.*

Section 3744 is as follows:

"It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order according to the number of papers composing the whole return."

In the case of Clark *vs* the United States, 95 U. S., 539, the Supreme Court held that so much of this statute as requires contracts to be in writing is mandatory, and that

a contract with either one of the three Departments named, not reduced to writing, is not binding on the United States; and in the case of South Boston Iron Company *vs.* The United States, 118 U. S., 37, where an offer to render services to the Navy Department, upon specifications to be thereafter prepared, had been accepted by the Navy Department subject to the preparation of the specifications, it was held that there was no completed contract. It is contended, on behalf of the respondent in the present case, that these decisions apply here, and that the advertisement, the proposal, and the acceptance amounted to nothing because the formal articles of agreement contemplated by the specifications were not entered into by the parties.

It is submitted that the statute does not invalidate the contract in the present instance, and that both of the decisions above referred to were rendered upon a state of facts so different from those now before the court that they do not affect the claims of this relator.

In the case of Clark *vs.* the United States, the contract was entirely verbal. In the case of the South Boston Iron Company *vs.* The United States the offer, which was accepted, expressly stated that the work was to be done from drawings and specifications to be furnished, and the so-called acceptance concluded with the statement:

"The specifications and drawings will be furnished as soon as prepared."

In its opinion, the Supreme Court says:

"An effort has been made, in this case, to show a contract in writing, but we agree entirely with the Court of Claims that the papers relied on for that purpose are nothing more, in law or in fact, than the preliminary memoranda made by the parties for use in preparing a contract for execution in the form required by law. This

was never done, and therefore the United States never became bound."

Hence both these decisions proceeded upon the ground, that in the case before the court there was no contract in writing. In the present case, the whole contract, to the minutest detail, has been reduced to writing and signed. That a written contract was completed in this case, under the uniform decisions of the courts, including several arising on contracts of this nature, in which the Supreme Court of the United States held that the acceptance completed the contract, will be seen by pages 4 and 5 of this brief.

There is another case in the Supreme Court still more pertinent here—Harvey *vs.* the United States, 105 U. S., 671. In that case there had been an advertisement, a formal proposal, and an acceptance thereof, as in the case now before the court, but in that case the parties drew up and executed the formal articles of agreement, which are intended to be executed in all cases of this character.

But in preparing the formal articles of agreement, the terms of the proposal were not followed, and there was a substantial variance which threw upon the contractor the expense of constructing a part of the work, which, by the specifications referred to in the proposal, the Government was to do, and the Supreme Court held *that the real contract between the parties was that which was completed when the proposal was accepted;* that the clause in question was to be deemed as having been inserted in the formal articles of agreement by mistake and the case being before the Court of Claims under an act of Congress, which authorized that court to proceed according to the rules and principles of equity jurisprudence, it was held that it was its duty to reform the formal written articles of

agreement and make them conform to the prior contract between the parties. The Supreme Court says:

"The written bid, in connection with the advertisement, and the acceptance of that bid, constituted the contract between the parties, so far as regards the question whether the contract prices embraced the coffer-dam work. (Garfielde *vs.* the United States, 93 U. S., 242; Equitable Insurance Co. *vs.* Hearne, 20 Wall., 494). "The written contract in that respect was intended by both parties to be merely a reduction to form of the statement, as to work and prices contained in the bid. If the formal contract is susceptible of a different construction, to the prejudice of the contractors, it is very plain that not only the contractors but the officers of the Government were under a mistake * * * There is no evidence to show that the parties intended to alter the terms of the bid, as to work and prices. * * * We are of opinion that by the actual contract between the parties, the appellants were not to do any of the work covered by the claim, made by them under item 1 of the petition herein, and that the written contract must be reformed accordingly."

Here, then, is a decision of the court of last resort precisely in point which effectually disposes of the contention that we are here without a contract.

Disastrous, indeed, to the interests of the Government would be the effect of a contrary decision. If the acceptance of the proposal in these cases does not bind the Government, the contractor is not bound. If the Government is thereafter at liberty to refuse to enter into the formal articles of agreement stipulated for, so is the bidder. All the complicated machinery of specifications, proposals and guarantees and justification of guarantors, which has been devised to enable the Government to compel the bidder either to do what he has proposed to do, or to make good to the Government the damages resulting from his refusal, becomes useless. The success-

ful bidder, when a formal agreement is laid before him, having ascertained, perhaps, that he can not do the work or furnish the supplies at a profit, may refuse to sign it and the Government has no remedy but to begin again the work of seeking for a satisfactory bidder. This may be repeated indefinitely. Sham bids, supported by the best of guarantees, signed by the best of sureties, may be filed merely for the sake of making trouble. Indeed, there would be no further benefit to be derived from advertising for proposals. The statutes, requiring this to be done, and the work to be given to the lowest responsible bidder, might as well be repealed.

If the question were still open, it might well be argued that the act of June 2, 1862, which is now incorporated in Sections 3744 to 3747, is wholly directory. Such was the view of three of the eight Justices of the Supreme Court, who participated in the decision of the case of Clark *vs.* The United States. The law in question applies to contracts made before it was passed, saying that they should be reduced to writing, signed and filed. Clearly it was not the intention of Congress to repudiate the hundreds of verbal contracts which had been entered into by the three departments in question before the act was passed.

However this may be, it is evident, we submit, that Congress did not intend that an invitation properly signed, calling for proposals for work, a signed proposal duly filed in accordance with the invitation, and a formal written acceptance of the proposal, should not constitute a contract.

## IV.

*The provision in the relator's proposal as to the time of beginning and completing the work and as to suspending the*

*work during the prevalence of an epidemic did not render the acceptance void.*

The statute under which this work is to be done leaves the matter of the time within which it shall be begun or finished, entirely at the discretion of the Secretary of War (27 Stat. 90).

Nor is there anything in the advertisement inviting bids on this subject (23). That advertisement informs the public that specifications, blank forms, and *all available information* will be furnished on application. This not only indicates that the specifications alone did not contain all the data that bidders would require, but shows positively that information outside of them, presumably important for bidders to possess, would be communicated orally to anybody who made proper inquiry at the office of the local engineer in New York. Hence, even if the specifications fixed an absolute limit for the beginning of the work and for its completion it was entirely competent for the engineer officer in charge to verbally notify persons proposing to bid, when handing them the specifications, that if the interests of the Government would be subserved by a reasonable extension of the time, either for beginning or completing the work, or both, the War Department might grant such an extension.

But the specifications themselves disclose that the time mentioned in them for doing the work was to be considered merely as an approximation. Under the head of "*Time*" it is announced, first, that the work must be commenced on or before October 1, 1892, and completed on or before December 31, 1893; and, next, that "contractors proposing to build special plant for this work will so state in their bids, mentioning the date at which they will contract to begin work."

Here was a provision intended for the protection of the

United States. The War Department did not intend that the Government should be at the mercy of the owners of the dredging plants then in existence. In the very nature of things there would not be many such owners, and a combination amongst them might result in great loss to the Government. Therefore a clause was inserted to stimulate persons who might wish to go into the business *de novo*. As the bids were to be opened on the 14th of September, if the work was to be begun on the first of October, it was entirely out of the question for anybody to bid safely who had to provide the machinery for doing the work. A large part of the intermediate time would necessarily be used in transmitting the papers to the Chief of Engineers, receiving them back from him, notifying the successful bidder, preparing a formal bond, passing upon the sufficiency of the sureties, and executing and delivering the formal contract. Hence the specifications gave notice to all concerned that a day after the first of October—and a day sufficiently later to admit of the construction of an entire dredging plant—might be named for beginning the work and that such a proposal would receive due consideration by the Department.

It cannot be said that this privilege was that of merely delaying the beginning of the work, not its completion. It is to be presumed that the fifteen months allowed for doing the work was necessary and that delay in beginning operations would necessarily be followed by a corresponding delay in finishing the work, and this follows, necessarily, when the time required for building a complete dredging outfit is considered. There are other provisions in the contract papers which show that time was not considered of the essence of the proposal. Paragraph 35 of the specifications deals entirely with the matter of extension of the time for doing the work (14).

The "Guarantee" which was appended to the propo-

sals, and which was signed by the relator's sureties, binds the sureties to have their principal enter into a contract in accordance with the terms and conditions of the advertisement, if the bid of the principal "*shall be accepted in whole or in part within 60 days from the date of the opening of the proposals*" (18). Now as the proposals were not to be opened until September 14, this period of 60 days carried the time within which the relator might be bound by an acceptance to a day later than the 13th day of November, thus rendering it entirely out of the question, that the dates named in the specifications under the head of "Time" were to be considered binding.

Besides, the specifications provide otherwise for just such variances in the bids as those now under consideration. By paragragh 23 of the specifications the United States reserves the right not only to reject any and all bids, but to waive any informality in the bids received (13). It will not do to say in reply to this that the word "informality" refers to minor imperfections in the preparation of the proposal and accompanying papers, because paragraph 17 of the specifications expressly says: "Any conditions, limitations or provisos attached to proposals will be liable to render them *informal* and cause their rejection" (13).

All these provisions are inserted in the interest of the United States. It is to be remembered that the Secretary was not required to have this work done by contract at all. Ever since 1888 money appropriated for the improvement of rivers and harbors is to be applied "in carrying on the various works, by contract or otherwise, as will be most economical and advantageous to the Government" (25 Stat., 423). This, among other reasons, no doubt moved the Department to insert in the specifications the provision that the United States reserves the right to reject any and all bids. This is a great power and one not

conferred in so many words by the statute, but required from the necessity of the case to prevent a combination of bidders from getting the work at their own price. If such a power can be implied, why not the power to change a date?

The same statute gives to the Secretary of War the power to prescribe the manner and form of the advertisements for proposals, leaving entirely to his discretion how much of the details of the work shall be described in the advertisement itself. He prescribed a very simple form of advertisement, leaving the details of the work as to manner and time to be furnished to bidders by the officers of the engineer corps in charge.

It must be noted also that the bidder himself was not allowed to take advantage of any error or omission in the specifications, "as full instructions will always be given, should such error or omission be discovered" (31).

In the case of Salomon *vs.* The United States, 19 Wallace, 17, it was held that a subordinate officer of the War Department might verbally extend the time within which a contractor was required by his contract to furnish supplies to the Department. That was a suit by the contractor in the Court of Claims to recover the contract price for supplies furnished during the extended period, and it was claimed by the Attorney-General that under the act of June 2, 1862 (now Section 3744, Revised Statutes, see page 8 of this brief) the supplies in question must be deemed to have been furnished under an oral contract, which was void because not in writing. Mr. Justice Miller, speaking for the court, says:

"The act of 1862, requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of the matter accepting delivery of such supplies after the time stipulated, nor is a verbal agreement to extend the time of performance invalid."

In Manufacturing Company *vs.* United States, 17 Wall., 592, the contractor had not furnished any of the carbines contracted for within the time fixed by its contract, yet it was held that certain changes which were made in the construction of the arms at the request of the Government of itself worked an extension of the time. The contract in that case was made in 1863 but it was not even suggested that the act of 1862 had any application to the case.

In the case of Chicago *vs.* Greer, 9 Wallace, 726, it appears that the city had advertised for fire-hose "warranted to stand a pressure of 200 lbs. to the square inch." Greer made a bid in writing stating that the hose he proposed to furnish was "to be tested in a fair and impartial manner, and to be made to stand 200 lbs. pressure to the square inch." This was a clear departure in the proposal from the terms of the advertisement, but the Supreme Court held that when such a proposal was accepted it was too clear for argument that the proposal and the acceptance completed a contract between the parties.

It is important to bear in mind in this connection the enlarged discretion of the heads of executive departments in matters of this kind (See United States *vs.* Adams, 7 Wall., 463; Parker *vs.* United States, 1 Peters, 293; United States *vs.* Speed, 8 Wall., 77). It is impossible to read these decisions and section 3 of the act of 1888 (25 Stat., 423) without being forced to the conclusion that the acceptance by the War Department of the relator's bid containing a reasonable modification of the time within which the work in question was to be done was a matter entirely within the discretion of that Department, and not such a departure from the specifications as rendered absolutely void the acceptance and any formal contract that might be entered into thereunder.

There is no middle ground. The acceptance was good and completed the contract, or it was void. If void, the vice would have extended to the formal articles of agreement had they been signed, and the relator could have refused to comply with them with impunity. Had that course been pursued and this were a suit by the Government on the relator's bond, would *we* be heard to say that there was no contract?

The same argument applies to that clause of the proposal which refers to the prevalence of an epidemic. When these bids were opened cholera ships were quarantined in the very harbor where this work was to be done. To provide for a suspension of operations while the plague was flagrant was no more than would have been done in any event. The Secretary of War had the power certainly to consent to such a provision, and that is all that is required.

V.

*The duty of the Secretary of War, to cause articles of Agreement to be signed in this case, is a ministerial duty, and not one involving the exercise of discretion.*

Section 3744 declares that it shall be the duty of the Secretaries named to cause and require every contract made by them * * * *or by their officers under them appointed to make such contracts*, to be reduced to writing and signed by the contracting parties, with their names at the end thereof, and further requires that a copy shall be filed in the Returns Office of the Interior Department, with a copy of all bids, offers, proposals and advertisements. Clearly this act had mainly in contemplation just such contracts as the one upon which we rely. It does not use the language which is found in all statutes of frauds, that no contract should be valid unless, etc.,

but it refers to contracts as subsisting things and provides that they shall be put into the specific form mentioned in the act.

"It shall be the duty of the Secretary of War," is the language of the law. What is required is simply a clerical service. Given the advertisement, the specifications, the proposal endorsed thereon, the acceptance, and the blank form of contract, referred to in paragraph 25 of the specifications, anybody can from them prepare the formal articles of agreement. Nothing has been left open. Otherwise, the contractor would not be bound, and every bidder would be as free, after his proposal had been accepted, as he was before he made his bid.

But it will be claimed, no doubt, that the Secretary has himself considered this matter, and that since he, in the performance of his duties and after proper consideration, has reached the conclusion that he is not bound to execute articles of agreement in this case, the court will not interfere with this determination on his part, however it may differ from him as to the correctness of his views of the law, because that would be to attempt to control him in the exercise of a discretionary power.

A brief review of the leading decisions in this court and in the Supreme Court of the United States will show that this claim is utterly untenable:

In Kendall *vs.* The United States (5 Cr. C. Ct., 163; 12 Pet., 524), the Postmaster-General, construing an act of Congress, had concluded that it was not his duty to give the relator in that case a certain credit upon his accounts with the Post-Office Department. The Circuit Court of the District of Columbia found that the Postmaster-General had erred in his reasoning, and that it was his duty to make the credit in question, and the mandamus issued accordingly. The Supreme Court affirmed the judgment.

In Butterworth *vs.* Hoe (3 Mackey, 229; 112 U. S. 50),

the Commissioner of Patents had decided that the relator in that case was entitled to a patent, notwithstanding adverse claims set up in an interference proceeding, and an appeal was taken to the Secretary of the Interior, who reversed the decision of the Commissioner and directed that the patent should not issue. A question was raised whether there existed any right of appeal to the Secretary, and whether the Commissioner's decision was not final. The Secretary decided that he had the right to revise the decisions of the Commissioner. In this view he was sustained by an elaborate opinion of the Attorney-General, and accordingly the Commissioner declined to issue the patent, concluding that he was bound by the decision and instructions of his superior officer. But this court in general term found that the reasoning of the Attorney-General, and of the Secretary of the Interior, and of the Commissioner of Patents was all wrong, and by the writ of mandamus it required the Commissioner to prepare a patent and submit it to the Secretary of the Interior for his signature. The Supreme Court affirmed this judgment, too. It is to be presumed that the Secretary of the Interior signed the patent, else there would have been a second proceeding in mandamus in that case.

In the case of The United States *vs.* Schurz, 102 U. S., 378, the question was, whether the relator was entitled to a mandamus to compel the delivery to him, by the Secretary of the Interior, of certain letters patent for a tract of public land. The relator had made application for a patent in due form, and the patent had been signed, sealed and recorded, but not delivered. In such cases, it is held that the title passes to the patentee when the patent is signed and recorded—delivery not being essential. In the particular case in question (as appears from the answer to the rule to show cause, filed in this court by the Secretary of the Interior) the patent had been re-

corded through the oversight of a clerk, after an order had been made in the case suspending action therein: and after a full investigation, all parties having been heard by him, he, the Secretary, determined that the patent should not have been signed or recorded; that other parties who had adverse and conflicting claims were entitled to the land; and that it was his duty to cancel the patent instead of delivering it to the relator. This court held that the relator was not entitled to the relief which he sought, but the Supreme Court held otherwise, and directed that a mandamus should issue, requiring the delivery of the patent to the grantee.

These cases and many others, to which we shall take occasion to refer during the argument, establish the proposition that the decision by an executive officer *that he has the right to exercise his discretion in a certain matter*, is not one which is binding upon the courts, and that however conscientious and careful may be his investigation, and however well-founded he may think his conclusion is, yet if the courts, upon the application of the party interested, find that, as a matter of fact, the officer had no discretion in the premises, a mandamus will issue.

## VI.

*The relator has no adequate remedy except by mandamus.*

The situation here is substantially the same as in the above mentioned cases of Butterworth *vs.* Hoe, 112 U. S., 50, and United States *vs.* Schurz, 102 U. S., 378. The title of the relator is complete and what he seeks to obtain is the proper evidence thereof. The paper which the relator holds is the letter of September 22, 1892, signed by Lieut. Col. Gillespie, informing the relator that its proposal is accepted. The proposal itself and the accompanying papers are in the hands of the Government. There is nothing in the possession of the relator

to prove that the action of Lieut. Col. Gillespie in writing the letter in question was duly authorized by the Chief of Engineers. These facts may be admitted in this case, but the rights of the relator are to be determined by the facts as they existed when he filed his petition; and further, if the Government should not perform the contract on its part, and the relator should be driven to an action in the Court of Claims for the recovery of damages it would be at a great disadvantage in the absence of the proper evidence of its claim. It would be at the mercy of the Government. Again, in obtaining from others the machinery and labor required to enable it to perform the work, it is of great importance that it should be able to exhibit to them the proper evidence that it holds the contract. In many other ways the possession of a formal contract is necessary for the protection of the relator.

The only other possible remedy would be an action against the Secretary of War for damages for failing to execute a formal contract as required by Section 3744. The Supreme Court of the United States has twice decided that this is not such a remedy as will defeat an application for a mandamus (Kendall *vs.* The United States, 12 Pet., 614; United States *vs.* Black, 128 U. S., 52).

## VII.

*The writ of mandamus should issue as prayed in the petition.*

The relator has brought its case within the principles laid down by the Supreme Court of the United States as to applications for mandamus in all its decisions on this subject from Marbury *vs.* Madison to Butterworth *vs.* Hoe. The court is not asked to assume or control any of the functions of the Executive or in any way to interfere with the operations or the business of the War Department. Whether the dredging of the channels of Gowanus Bay

shall be done by the relator or by some other contractor, or done at all, is not the question. In that respect the discretion of the Secretary of War may not be the subject of judicial review. All that we ask is that the relator may have the written evidence of its rights which the mandate of the law makes it the duty of the Secretary of War to give to it. This is in no sense a suit against the Government. As in Marbury *vs.* Madison, and Kendall *vs.* The United States, and United States *vs.* Schurz, and Butterworth *vs.* Hoe, the duty which it is sought to enforce is purely ministerial, and is imposed directly upon the respondent by a positive statute. When a general law requires a certain thing to be done in favor of individuals, whenever a certain state of facts shall exist, and the contingency has arisen which the law contemplates, the particular individual interested has a right to relief by mandamus just as if there had been a special statute directing the very thing to be done in respect of which he applies for the writ (Morton *vs.* Comptroller General, 4 S. C., 430). The Secretary of War, so far as concerns the particular duty now in question, stands in the same position as would the clerk of this court if the statute required that in such a case as this he should prepare and record formal papers evidencing the completed contract.

Nor do we understand that this is denied, assuming that we are right in our construction of Section 3744 of the Revised Statutes. As advised by the Attorney-General and the Acting Judge Advocate-General, the Secretary of War has been led to the conclusion that under that section the acceptance of the relator's proposal by his authority is not conclusive because formal articles of agreement have not been executed—that until he has signed or caused to be signed such articles, the matter still lies within the bounds of his discretion. That this is erroneous has been shown, we think, by the words of the

statute itself and by the subsequent decisions of the Supreme Court of the United States in Garfielde *vs.* United States, 93 U. S., 242, and in Harvey *vs.* United States, 105 U. S., 671. The objection made to the proposal which the relator submitted that it contained such a departure from the terms of the advertisement as to authorize the rejection of the proposal is therefore not before the court. If instead of accepting the relator's proposal the War Department had thrown it out because of its alleged informalities and the relator thereupon had asked for the interference of the courts a very different question would have been presented; but at the most the only effect of the insertion in the relator's proposal of the clause relating to time would have been to give the Department the right to reject its proposal on that account. When it was accepted, however, it put the relator in precisely the same position that it would have been had it in its proposal followed the very words of the specifications.

It is submitted that the answer of the respondent to the rule to show cause presents no defence and that the relator is entitled to the relief it seeks.

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# In the Supreme Court of the District of Columbia.

No. 33596—At Law.

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The United States ex rel. the International Contracting Company
*vs.*
Stephen B. Elkins, Secretary of the Department of War.

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## BRIEF FOR RESPONDENT.

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### POINTS.

### I.

**The Secretary of War was authorized to stop the making and prohibit the signing and execution of the proposed contract.**

(*a*) By the Constitution, the executive power of the Government is vested in the President.

By section 214, Revised Statutes, an Executive Department is established, to be known as the Department of War, and the Secretary of War is declared to be the head thereof.

In *United States* v. *Dunn* (120 U. S., 252) Mr. Justice Miller, in delivering the opinion of the court, says:

> The military establishment of this country is divided by the general laws of the United States into the army and the navy, and over each of these one of the great heads of departments, called secretaries, is appointed to preside, to manage and to administer its affairs. The administrative functions of the executive are mostly under the President, distributed and allotted among the seven great departments, at the head of each of which is a minister for that department. Such is the theory of the distribution of executive administration established by the statutes of the United States.

It is beyond question that the head of the War Department may appoint the Chief of Engineers to sign contracts, and under the regulations he is accustomed to sign, but he signs by virtue of the power vested in the President, and distributed to the head of the War Department.

It follows that the Secretary may, upon occasion, resume or personally exercise his authority, or, by virtue of his inherent power and responsibility under the Constitution and the statute, he may prohibit or enforce the act of signing.

(*b*) The statutory requirement as to the completion and signing of contracts is this:

By section 3744, Revised Statutes, it is enacted that—

> It shall be the duty of the Secretary of War * * * to cause and require every contract made * * * on behalf of the Government, or by * * officers under (him), appointed to make such

> contracts, to be reduced to writing, and signed by the contracting parties, with their names at the end thereof. * * *

This section is brought from the act of June 2, 1862, the title of which, indicating the purpose of Congress, is as follows: "An act to prevent and punish fraud on the part of officers intrusted with making of contracts for the Government."

The duty of the head of the Department is pointed out.

The responsibility of action is with the Secretary; if another officer acts, he acts under the Secretary; it is the Secretary who appoints, and it is specially made the duty of the Secretary to "cause and require every contract * * * to be reduced to writing * * * and signed by the contracting parties, with their names at the end thereof." His duty to supervise the making of contracts in his Department is clearly recognized. The orderly procedure of business requires such supervision.

How, then, can it be claimed that the Secretary is powerless to interfere with a contract which he believes to contain unlawful or injurious provisions, and which is being made under him, in his Department, by his subordinate?

(c) The legitimate and necessary conclusions which must follow this doctrine of the responsibility and power of the head of a Department appear in the decisions of the courts, and especially in *Clark* vs. *United States* (95 U. S., 539, 541, 542); *South Boston Iron Company* vs. *United States* (118 U. S., 37, 42); and *Schneider* v. *United States* (19 C. Cls., 547, 551, 552).

It is fairly to be deduced from these cases that until the act of signing, the contract does not legally exist, and that the controlling executive power may prevent its coming into existence at any time before it is signed by the parties thereto, as the statute commands.

(*d*) It may be that the approval of the Chief of Engineers and the letter sent by Lieut. Col. Gillespie are sufficient to entitle relator to such damages as he may prove. In this direction he may find another remedy than the proceeding at bar.

A contract was held good for purposes of damages in the Schneider Case, it having been signed by the claimant and the Supervising Architect.

This view is accepted in *Clark* v. *United States*, the opinion saying (p. 542):

> We do not mean to say that where a parol contract has been wholly or partially executed and performed on one side the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*.

But, it is respectfully submitted, damages may be obtained in a suit therefor in cases in which the court will not enforce the signing of a contract, or the writing and signing of a contract, under section 3744 and the decisions thereunder.

(*e*) If the claimed contract is now valid it does not need to be signed. If it is not now valid, and the Secretary believes it to be unauthorized by and contrary to law, the court is not, under the decisions, empowered to command its execution.

For convenient reference the opinion in *Clark* v. *United States*, so far as in point, is presented below:

> It is contended on the part of the Government that this act is mandatory and binding both on the officers making contracts and on the parties contracting with them; whilst the claimant insists that it is merely directory to the officers of the Government, and can not affect the validity of contracts actually made, though not in writing. The Court of Claims has heretofore held the act to be mandatory, and as requiring all contracts made with the departments named to be in conformity with it. The arguments by which this view has been enforced by that court are of great weight, and, in our judgment, conclusive. The facility with which the Government may be pillaged by the presentment of claims of the most extraordinary character, if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the Government, should be in writing. Perhaps the primary object of the statute was to impose a restraint upon the officers themselves, and prevent them from making reckless engagements for the Govment; but the considerations referred to make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this.
>
> And we think that the statute in question was intended to operate as such. It makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party

aids in the violation of the law. We are of opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it. After that, if the officer fails to follow the further directions of the act with regard to affixing his affidavit and returning a copy of the contract to the proper office, the party is not responsible for this neglect.

(f.) It will be noted that paragraph 17 of the specifications provides that:

> Any conditions, limitations, or provisos attached to proposals will be liable to render them informal and cause their rejection.

But in the case before us the change is much more than the slight failure "to comply strictly" of Army Regulation No. 639, or an informality; it is a radical departure from the terms offered to bidders.

## II.

### THE PROPOSITIONS OFFERED BY THE RELATOR AND INCORPORATED INTO THE BLANKS WERE NOT LEGITIMATE OR PROPER IN PROPOSALS UNDER THE ADVERTISEMENT AND SPECIFICATIONS.

The statutory requirements as to advertising for proposals are as follows:

By section 3709, Revised Statutes, it is provided, subject to exceptions not of consequence here, that—

> All purchases and contracts for supplies or services in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same.

Following a provision of the river and harbor act of 1878 (20 Stat., 160), the corresponding act of 1888 (25 Stat., 423) directs—

> That it shall be the duty of the Secretary of War to apply the money herein and hereafter appropriated for improvements of rivers and harbors, other than surveys, estimates, and gaugings, in carrying on the various works, by contract or otherwise, as may be most economical and advantageous to the Government. Where said works are done by contract, such contract shall be made after sufficient public advertisement for proposals, in such manner and form as the Secretary of War shall prescribe.

Advertisement was made and specifications were submitted, but the bidder did not follow them.

Relator's bid postponed the time of commencement beyond the date fixed by the Government.

It also reserved indefinite and undefined privileges, to be exercised, apparently, in its own discretion, in case an epidemic should prevail.

It also put off and postponed, directly and unqualifiedly, the date for the completion of the dredging five months.

This was not in accord with the advertisement.

It was in contravention of the specifications.

It was not on the line of bids which properly regarded the specifications.

If successful the relator takes a contract upon conditions which were kept secret from other bidders.

The statutory purpose of advertising is practically defeated.

Other competitors are not given fair and equal opportunities.

The public are injured by being prevented from obtaining the benefits of fair competition.

Relator named conditions known to no one but itself, and more favorable to a dredger than the specifications offered; it bid upon its own specifications while its competitors bid upon the Government's specifications; it demanded a contract under this singular procedure, and, finally, after due consideration the contract was refused by the head of the War Department.

Now the relator comes into court and asks that the Government shall be commanded to grant and write out and sign a contract sought by such procedure.

It is respectfully submitted that neither the method of seeking nor the result sought can commend itself to the judicial judgment.

## III.

THE OFFICIAL OPINIONS RENDERED IN THE PREMISES ARE SUFFICIENT TO CALL FOR A DISMISSAL OF THE PETITION.

It is respectfully submitted that the opinions delivered by the Acting Judge-Advocate-General of the War Department, and that delivered by the Attorney-General of the United States, are sufficient in terms and in effect to call for the dismissal of the petition:

First, by their force and effect as decisions of the law officers of the Government in a matter of pending executive consequence.

Second, on account of the grounds set forth in said opinions respectively.

## IV.

### THE GOVERNMENT HAD AUTHORITY TO REJECT THE BID OF RELATOR AS WELL AS ALL OTHER BIDS MADE.

By specification No. 23 "The United States reserves the right to reject any and all bids, and to waive any informality in the bids received * * * ."

In this case it may be inferred that a movement occurred leading towards waiving the erroneous insertion of unauthorized conditions as an informality but it appears that upon a full, deliberate, and extended hearing and consideration it was determined to reject all of the bids received, and such rejection was duly made.

It is submitted that it is contrary to the doctrine of the cases to command the officer rejecting to go back and accept relator's offer, and execute the contract it sought.

## V.

### THE EXECUTION OF THE CONTRACT SOUGHT BY RELATOR IS NOT A MERE MINISTERIAL ACT; IT IS AN ACT INVOLVING THE EXERCISE OF JUDGMENT, THEREFORE THE PETITION SHOULD BE DENIED.

The principle established by the courts is set forth in *Redfield* v. *Windom* (137 U. S., 644), where Mr. Justice Lamar, speaking for the court, says:

> That principle is that the writ of mandamus may issue where the duty which the court is asked to

enforce is plainly ministerial, and the right of the party applying for it is clear, and he is without any other adequate remedy; and it can not issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion. The doctrine to be gathered from these cases, as well those in which mandamus was granted as those in which it was refused, especially from the two leading cases, *Kendall* v. *United States* (*supra*) and *Decatur* v. *Paulding* (*supra*), is thus enunciated in *United States ex rel. Dunlap* v. *Black* (*supra*), by Mr. Justice Bradley, who delivered the opinion of the court:

"The court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them." (P. 48.)

It is proper here to remark, as applicable to the determination of this case, that in the extreme caution with which this remedy is applied by the courts, there are cases when the writ will not be issued to compel the performance of even a purely ministerial act. In a case, for instance, where the intention of the officer, though acting within the scope of his duty, had been frustrated by a clerical mistake (*United States* v. *Schurz* (*supra*); or where the case is one of doubtful right (*New York Life and Fire Insurance Company* v. *Wilson* (8 Pet., 291, 302); or in a case

where, the relator having another adequate remedy, the granting of the writ may in this summary proceeding affect the rights of persons who are not parties thereto, or where it will be attended with manifest hardship and difficulties. *People* v. *Forquer* (Breese [1 Ill.], 68, 2d ed., 104); *Van Rensselaer* v. *Sheriff of Albany* (1 Cowen, 501, 512); *Oakes* v. *Hill* (8 Pick., 46).

In *United States* v. *Bank of Alexandria* (1 Cranch, 7) it is held that if the right of the party applying for a writ of mandamus be not clear the court will not grant it.

In the important case of the *United States* v. *Kendall* (5 Cranch, 163) the doctrine now under consideration was carefully examined. It is there held that the court has authority to issue a mandamus to an officer of the United States commanding him to perform a ministerial duty required by an act of Congress in which the right of the individual is concerned, if that right is clear and he has no other legal specific remedy.

In *Hull* v. *The Commissioner, etc.* (2 McA., 90) it is decided that a favorable decision of an examiner or of the Board of Examiners-in-Chief in the Patent Office, is not conclusive upon the Commissioner of Patents, and that it does not follow, thereupon that he has only the ministerial duty to perform of countersigning and sealing the patent. See also in this connection *United States ex rel. Hoe* v. *Butterworth* (3 M., 229).

In *United States ex rel.* v. *Boutwell* (3 McA., 172) it is held that the writ will not be issued to compel the payment of money when the act involves the exercise of judgment or discretion.

In *United States ex rel. Wallace* v. *Key* (3 McA., 337) it is held that this court will not grant a rule to show cause why an executive act, which requires investigation and the exercise of judgment, should not be performed.

In *United States ex rel., etc.*, v. *Bayard* (4 M., 310) it is held that the necessary ground of an application for the writ of mandamus against an executive officer of the United States is, that it shall appear that he has been charged by law with the performance of a specific official duty to which the petitioner is entitled, and that he refuses to perform that duty. (See also *United States ex rel. Hall* v. *Whitney* (5 M., 370.)

In *United States ex rel. Warfield* v. *Boutwell* (7 D. C., 64), this court holds that the right to issue the writ of mandamus to officers of the Government is limited to cases where the duties to be performed are strictly ministerial.

In *United States ex rel. Redfield* v. *Windom* (19 D. C., 54), this court again gives a painstaking consideration to the questions involved in this discussion. And this case was the occasion of the opinion delivered in the Supreme Court of the United States by Mr. Justice Lamar, quoted from above, and the decision of this court was duly affirmed.

The case of *United States ex rel. Dunlap* v. *Black*, before referred to, and Miller's Case, appear in 128 U. S., 40, 50, and are instructive upon the questions now at issue.

In the first-named case and in the case of Rose the rule as laid down by this court was affirmed, and in Miller's Case it was held that the rule to show cause might issue.

Such rule was granted by this court and return was made by the Commissioner of Pensions, and thereupon this court dismissed the petition, and this decision was duly affirmed in *Miller* v. *Raum* (135 U. S., 200).

The principle declared so many times in differing cases by this court and by the Supreme Court of the United States is again reaffirmed by both courts in the recent case of *United States ex. rel. Boynton* v. *Blaine* (139 U. S., 306).

It is respectfully submitted that the facts of the case at bar, and the documents set forth in paragraph 8 of respondent's return, show conclusively that the questions involved are such as call for an exercise of the judgment and discretion of the Secretary of War, and that the acts which the relator seeks to have performed are not merely ministerial.

## VI.

### THE CASE WHICH THE RELATOR BRINGS HERE HAS ALREADY BEEN DETERMINED AGAINST HIM.

It is shown by the documents set forth in paragraph 8 of the respondent's return that, September 26, 1892, the relator asked for a hearing in the premises. In pursuance of that request a hearing was had at the War Department before the Acting Secretary of War, in which the relator appeared by counsel and was heard at length. The case of relator was duly considered by the Acting Secretary and the questions now presented by relator's petition were thereupon duly decided and determined. The conclusions arrived at upon and in consequence of said hearing, and